

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

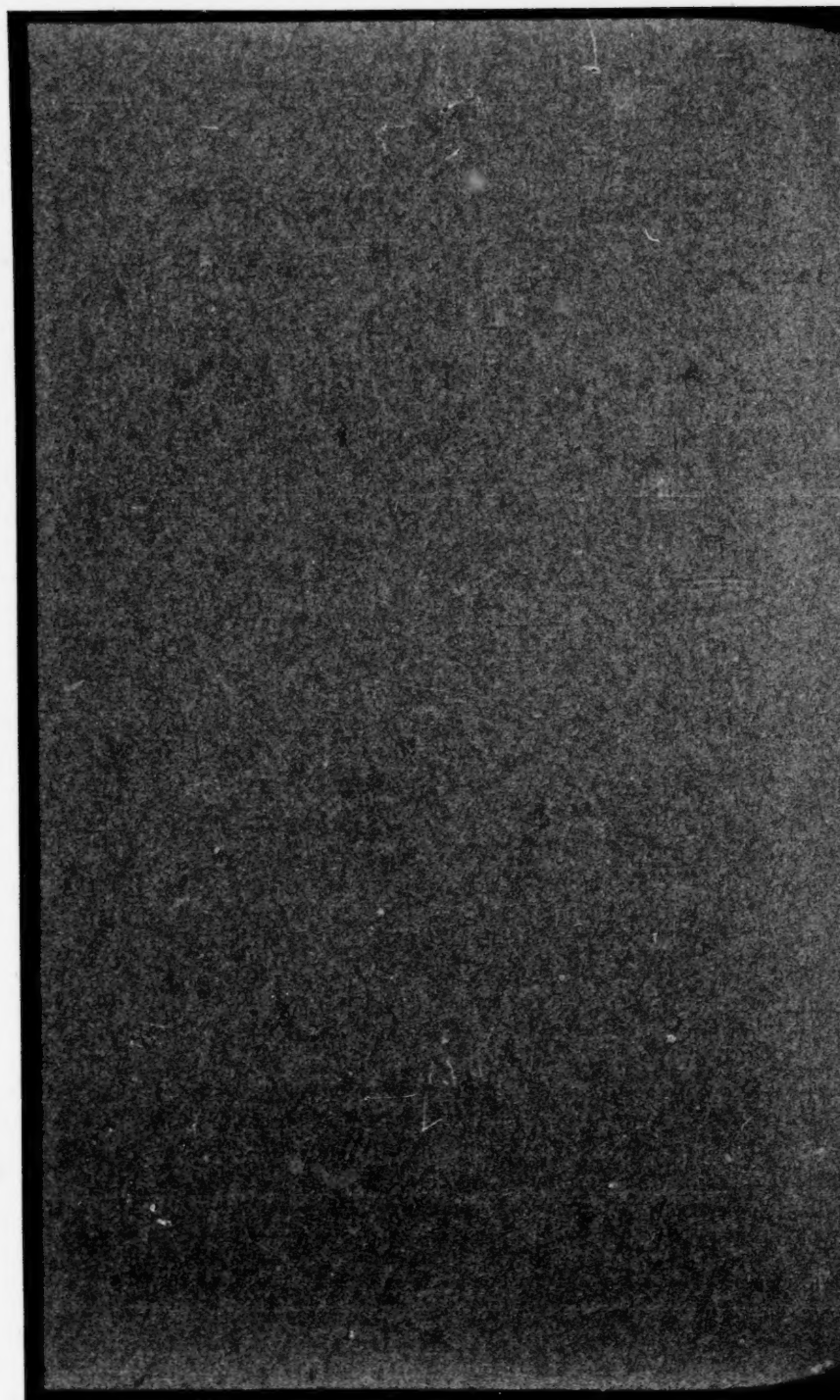
APPEAL FROM THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

No. 100-100000

HENRY ALBERTS, SENIOR, HENRY ALBERTS, JUNIOR,
AND THOMAS MARSH, SENIORS, IN ERROR.

THE UNITED STATES OF AMERICA

VS. HENRY ALBERTS, SENIOR, HENRY ALBERTS, JUNIOR, AND THOMAS MARSH, SENIORS, IN ERROR.



(30,404)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 439

HENRY ALBRECHT, SENIOR; HENRY ALBRECHT, JUNIOR,
AND THOMAS MAHER, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF ILLINOIS

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[fol. 1]

CAPTION—Omitted

[fol. 2] **IN UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF ILLINOIS**

Present: Honorable Walter C. Lindley, Judge.

No. 373-D

UNITED STATES

vs.

HENRY ALBRECHT, alias HENRY ALBRECHT, SENIOR (Sr.); HENRY
Albrecht, alias Henry Albrecht, Junior (Jr.); Louis H. Olden-
burg, Frank Ellis, and Thomas Maher

Information Violation National Prohibition Act

ORDER TO FILE INFORMATION—March 26, 1924

Now comes W. O. Potter, United States Attorney in and for the Eastern District of Illinois, and presents to the Court an information against Henry Albrecht, alias Henry Albrecht, Senior (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, charging said defendants with violation of the National Prohibition Act, and the Court having examined said information now orders that the same be filed, and that process issue for the said Henry Albrecht, alias Henry Albrecht, Senior, (Sr.), Henry Albrecht, alias Henry Albrecht, Junior, (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher.

It is further ordered that bail be fixed at Two Thousand Dollars (\$2,000.00).

Walter C. Lindley, Judge.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

INFORMATION—Filed March 26, 1924

W. O. Potter, United States Attorney in and for the Eastern District of Illinois, who prosecutes on behalf of the United States, in his own proper person comes into court this 26th day of March, A. D. 1924, and by leave of the court first had and obtained gives the court to understand and be informed, on the affidavit of J. A. Miller and D. P. Coggins, that Henry Albrecht, alias Henry Albrecht, Senior, (Sr.), Henry Albrecht, alias Henry Albrecht, Junior, (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, on to-wit, the 19th day of February in the year of our Lord one thousand nine hundred

twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District Aforesaid, and within the jurisdiction of said court, did then and there unlawfully sell a large quantity of intoxicating liquor, to-wit:—two drinks of whisky, which said whisky then and there contained more than one-half of one per cent of alcohol by volume, and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

W. O. Potter, United States Attorney.

[fol. 4]

Second Count

And W. O. Potter aforesaid, attorney for the United States as aforesaid, further gives the court to understand and be informed, on the affidavit of J. A. Miller and D. P. Coggins, that Henry Albrecht, alias Henry Albrecht, Senior, (sr.), Henry Albrecht, alias Henry Albrecht, Junior, (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, on to-wit, the 20th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully sell a large quantity of intoxicating liquor, to-wit: two drinks of whisky and a half pint of whisky, which said whisky then and there contained more than one-half of one per cent of alcohol by volume, and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

W. O. Potter, United States Attorney.

[fol. 5]

Third Count

And W. O. Potter aforesaid, attorney for the United States as aforesaid, further gives the court to understand and be informed, on the affidavit of Otto Turley and O. Jones, that Henry Albrecht, alias Henry Albrecht, Senior, (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, on to-wit, the 16th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully sell a large quantity of intoxicating liquor, to-wit: one-half pint of whisky, which said whisky then and there contained more than one-half of one per cent of alcohol by volume, and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

W. O. Potter, United States Attorney.

[fol. 6]

Fourth Count

And W. O. Potter aforesaid, attorney for the United States as aforesaid, further gives the court to understand and be informed, on the affidavits of J. A. Miller, D. P. Coggins, Otto Turley and O. Jones, that Henry Albrecht, Alias Henry Albrecht, Senior, (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, on to-wit, the 27th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully sell a large quantity of intoxicating liquor, to-wit: one-half pint of whisky, which said whisky then and there contained more than one-half of one percent of alcohol by volume and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

W. O. Potter, United States Attorney.

[fol. 7]

Fifth Count

And W. O. Potter aforesaid, attorney for the United States as aforesaid, further gives the court to understand and be informed, on the affidavit of J. A. Miller and D. P. Coggins, that Henry Albrecht, alias Henry Albrecht, Senior, (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis, and Thomas Maher, on to-wit, the 19th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully have in their possession a large quantity of intoxicating liquor, to-wit one-half pint of whisky, which said whisky then and there contained more than one-half of one percent of alcohol by volume, and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

W. O. Potter, United States Attorney.

[fol. 8]

Sixth Count

And W. O. Potter aforesaid, attorney for the United States as aforesaid, further gives the court to understand and be informed, on the affidavit of J. A. Miller, and D. P. Coggins, that Henry Albrecht, alias Henry Albrecht, Senior (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank

Ellis and Thomas Maher, on to-wit, the 20th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully have in their possession a large quantity of intoxicating liquor, to-wit one-half pint of whisky, which said whisky then and there contained more than one-half of one percent of alcohol by volume, and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

W. O. Potter, United States Attorney.

[fol. 9]

Seventh Count

And W. O. Potter aforesaid, attorney for the United States as aforesaid, further gives the court to understand and be informed, on the affidavit of Otto Turley and O. Jones, that Henry Albrecht, alias Henry Albrecht, Senior (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, on to-wit, the 16th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully have in their possession a large quantity of intoxicating liquor, to-wit, one-half pint of whisky, which said whisky then and there contained more than one-half of one percent of alcohol by volume, and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

W. O. Potter, United States Attorney.

[fol. 10]

Eighth Count

And W. O. Potter aforesaid, attorney for the United States as aforesaid, further gives the court to understand and be informed, on the affidavits of J. A. Miller, D. P. Coggins, Otto Turley and O. Jones, that Henry Albrecht, alias Henry Albrecht, Senior (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, on to-wit, the 27th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully have in their possession a large quantity of intoxicating liquor, to-wit: one-half pint of whiskey, which said whiskey then and there contained more

than one-half of one percent of alcohol by volume, and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

W. O. Potter, United States Attorney.

[fol. 11]

Ninth Count

And W. O. Potter aforesaid, attorney for the United States as aforesaid, farther gives the Court to understand and be informed, on the affidavits of J. A. Miller, D. P. Coggins, Otto Turley and O. Jones, that Henry Albrecht, alias Henry Albrecht, Senior (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, on to-wit, the 27th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully maintain a common nuisance in violation of the provisions of the National Prohibition Act, by then and there unlawfully selling, keeping and bartering intoxicating liquor in a certain building located at 328 East Broadway, in the City of East St. Louis aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Wherefore, W. O. Potter aforesaid, attorney for the United States as aforesaid, in behalf of the United States prays the consideration of the court herein the premises and that due process of law may be awarded against the said Henry Albrecht, alias Henry Albrecht, Senior (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, in this behalf to make answer to The United States touching and concerning the premises aforesaid.

W. O. Potter, United States Attorney.

[fol. 12] AFFIDAVIT OF OTTO TURLEY AND O. JONES

Otto Turley and O. Jones being first duly sworn upon their oaths depose and say that on, to-wit, February 16, 1924, they went to the place of business of Henry Albrecht & Company, 328 East Broadway, East St. Louis, St. Clair County, Illinois and there purchased from Thomas Maher, who was the bartender at said place of business, one-half pint of colored spirits, or whiskey, which said whiskey contained more than one-half of one per cent of alcohol by volume, and was fit for beverage purposes.

Affiants further state that Henry Albrecht, Senior, was standing near them and in a position so that he could see the spirits or whiskey delivered to them; that Henry Albrecht, Senior, and several

men were drinking highballs which said Albrecht mixed in front of all spectators, using whiskey which he carried from a rear room in whiskey glasses.

Affiants further state that Henry Albrecht, Junior, was occupying the cashier's cage or desk in said place of business and repeatedly went from said desk to places behind the bar therein and cashed a check for affiant Turley with which cash so received affiant purchased the whiskey as herein stated.

Otto Turley, O. Jones.

Subscribed and sworn to before me this 31st day of March,
A. D. 1924. Virginia A. Drone, Deputy U. S. Clerk,
East. Dist. Ill. (Seal U. S. Dist. Court.)

[fol. 13] AFFIDAVIT OF J. A. MILLER AND D. P. COGGINS

J. A. Miller and D. P. Coggins, being first duly sworn, upon their oaths depose and say that on, to-wit, February 19, 1924, at about 5:00 P. M. they went to the place of business of Henry Albrecht & Company, 328 East Broadway, East St. Louis, St. Clair County, Illinois, and there purchased from Thomas Maher, who was there acting as bartender, two drinks of whiskey, which whiskey contained more than one-half of one per cent of alcohol by volume, and was fit for beverage purposes, for which we paid 50¢ per drink.

Affiants further state that on February 20, 1924, at 4:00 P. M. they went to the aforesaid place of business of Henry Albrecht & Company and there purchased two drinks of whiskey and one-half pint of whiskey, which said whiskey contained more than one-half of one per cent of alcohol by volume and was fit for beverage purposes, said purchases were made from the aforesaid Thomas Maher; said purchases were made in the presence of Henry Albrecht's son, Henry Albrecht, Junior.

David P. Coggins, J. A. Miller.

Subscribed and sworn to before me this 31st day of March,
A. D. 1924. Virginia A. Drone, Deputy U. S. Clerk,
East. Dist. Ill. (Seal U. S. Dist. Court.)

[fol. 14] AFFIDAVIT OF OTTO TURLEY AND O. JONES

Otto Turley and O. Jones, being first duly sworn, upon their oath depose and say that on February 16, 1924, at 328 East Broadway, St. Clair County, Illinois, they purchased from H. Albrecht and Company one-half pint of colored spirits, which colored spirits contained more than one-half of one per cent of alcohol by volume and then and there fit for beverage purposes.

Affiants further say that Henry Albrecht Sr., was standing near them and in a position so that he could see the colored spirits delivered to them; that Henry Albrecht, Sr., and several men were drinking highballs which Albrecht mixed in front of all spectators, using whiskey which he carried from a rear room in whiskey glasses. And further affiants sayeth not to the contrary.

Otto Turley, O. Jones.

Subscribed and sworn to before me this 20th day of February,
A. D. 1924. Earl H. Gibson. (Seal.)

Subscribed and sworn to before me this 31st day of March,
A. D. 1924. Nell M. Shedd, Deputy U. S. Clerk, Eastern
District of Illinois. (Seal U. S. Dist. Court.)

[fols. 15 & 16] AFFIDAVIT OF J. A. MILLER AND D. P. COGGINS

J. A. Miller and D. P. Coggins, being first duly sworn, upon their oath depose and say that on February 19th, 1924, at 5 P. M., they went to Henry Albrecht & Co., at 328 East Broadway, East St. Louis, St. Clair County, Illinois, and after purchasing two drinks of whiskey, which whiskey contained more than one-half of one per cent of alcohol, they asked the bartender for a half pint of whiskey and he replies that they didn't have a sufficient supply on hand to let a half pint go out as they were after some now and would have it later.

Affiants further state that on February 20, 1924, at 4 P. M., they went to Albrechts' place of business again, and after purchasing two drinks of whiskey, they asked for half pint of whiskey, which he gave them charging them \$2.50 for the same.

Affiants further state that the bartender who waited on them on both occasions was dark complected about six feet tall and that on February 20th, he sold the whiskey in the presence of Mr. Henry Albrecht's oldest son Henry Albrecht Jr.

And further affiants sayeth not to the contrary.

J. A. Miller, D. P. Coggins.

Subscribed and sworn to before me this 20th day of February
A. D. 1924. Earl H. Gibson. (Seal.)

Subscribed and sworn to before me this 31st day of March
A. D. 1924. Nell M. Shedd, Deputy U. S. Clerk, Eastern
Dist. of Ill. (Seal U. S. Dist. Court.)

[File endorsement omitted.]

[fols. 17 & 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR WARRANT—March 26, 1924

And now on this 26th day of March, A. D. 1924, comes W. O. Potter, United States Attorney for the Eastern District of Illinois, and upon his motion it is ordered by the Court that a Bench Warrant issue for the arrest of the defendants herein, directed to the Marshal of this district to execute, returnable forthwith at Danville, in said district.

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO QUASH INFORMATION—Filed March 28, 1924

Now comes Henry Albrecht, Alias Henry Albrecht, Senior, (Sr.), Henry Albrecht, Alias Henry Albrecht, Junior, (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, defendants in the above entitled cause, by D. E. Keefe, S. W. Baxter and C. A. Karch, their attorneys, and specially limit their appearance in this cause for the purpose of interposing the following motion, hereby protesting that this Court has no jurisdiction of the persons or either of them, and of the subject matter of this cause; and in that behalf move to quash the information and each count thereof filed in this cause and say:

I. That there are no sufficient facts pleaded or set forth in said information or either count thereof to charge these defendants or either of them with the commission of any crime or the violation of any law of the United States.

II. Because said information and each count thereof has not been presented to the Court properly verified, in this, that it is not verified by the United States Attorney for the Eastern District of Illinois, nor is there any proper or sufficient affidavit attached to or made any part of said information to show probable cause as required by law.

III. Because the affidavits attached to and made in support of the said information and the several counts thereof, are not sufficient to [fols. 20 & 21] charge the defendants jointly nor to support the charge in said information or any count thereof of any joint action, or the commission of any criminal offense by joint action on the part of the defendants of any law of the United States.

IV. Because the affidavits attached to said information and upon which affidavits the said information and each count thereof has been presented to the Court and a warrant issued thereon are not

sufficient to authorize the issuance of any warrant against the defendants or either of them as has been done in this cause.

V. Because the affidavits thereto attached fail to show probable cause for the prosecution of the defendants for a violation of any law of the United States and are insufficient to support the information or any count thereof.

VI. Because the verification and authentication of each affidavit is insufficient to support the information and each count thereof.

VII. Because the affidavits thereto attached and each of them are not such and are insufficient to subject the affiants therein or either or any of them to the pains and penalties of perjury if the matters therein set forth and alleged are false.

D. E. Keefe, S. W. Baxter, Charles A. Karch, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 22] AFFIDAVIT OF OTTO TURLEY AND O. JONES—Omitted;
printed side page 12 ante

[fols. 23 & 24] AFFIDAVIT OF J. A. MILLER AND D. P. COGGINS—
Omitted; printed side page 13 ante

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO QUASH INFORMATION AND WARRANT—Filed March 31,
1924

Now comes Henry Albrecht, alias Henry Albrecht, Senior, (Sr.) Henry Albrecht. Alias Henry Albrecht, Junior, (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, defendants in the above entitled cause, by D. E. Keefe, S. W. Baxter and C. A. Karch, their attorneys, and specially limit their appearance in this cause for the purpose of interposing the following motion, hereby protesting that this Court has no jurisdiction of the persons or either of them, and of the subject matter of this cause; and in that behalf move to quash the information and each count thereof, and the warrant issued on the same, filed in this cause and say:

I. That there are no sufficient facts pleaded or set forth in said information or either count thereof to charge these defendants or either of them with the commission of any crime or the violation of any law of the United States.

II. Because said information and each count thereof has not been presented to the Court properly verified, in this, that it is not verified by the United States Attorney for the Eastern District of Illinois, nor is there any proper or sufficient affidavit attached to or made any part of said information to show probable cause as required by law.

III. Because the affidavits attached to and made in support of the said information and the several counts thereof, are not sufficient to charge the defendants jointly nor to support the charge in said information or any count thereof of any joint action, or the commission of any criminal offense by joint action on the part of the defendants of any law of the United States.

IV. Because the affidavits attached to said information and upon which affidavits the said information and each count thereof has been presented to the Court and a warrant issued thereon are not sufficient to authorize the issuance of any warrant against the defendants or either of them as has been done in this cause.

V. Because the affidavits thereto attached fail to show probable cause for the prosecution of the defendants for a violation of any law of the United States and are insufficient to support the information or any count thereof.

VI. Because the verification and authentication of each affidavit is insufficient to support the information and each count thereof.

VII. Because the affidavits thereto attached and each of them are not such and are insufficient to subject the affiants therein or either or any of them to the pains and penalties of perjury if the matters therein set forth and alleged are false.

VIII. Because the affidavits upon which such information rests were attached thereto after the said information had been filed.

IX. Because the original affidavits upon which the information was issued and upon which warrants for arrest were issued were made before a Notary Public and immediately before the case was called for trial the Government, by leave of court, amended the said original affidavit by causing the same to be re-executed and again sworn to before the Clerk of the Court.

D. E. Keefe, S. W. Baxter, Charles A. Karch, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 28]

IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER—Filed March 31, 1924

And the said Henry Albrecht, alias Henry Albrecht, Senior, (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis, and Thomas Maher, by Charles A. Karch and Samuel W. Baxter, their attorneys, come into court and say that the said information and the matters and things therein set forth, as well as in each count thereof, are not sufficient in law to compel them, the defendants, or either of them to answer thereto, for that:

I. That there are no sufficient facts pleaded or set forth in said information or either count thereof to charge these defendants or either of them with the commission of any crime or the violation of any law of the United States.

II. Because said information and each count thereof has not been presented to the Court properly verified, in this, that it is not verified by the United States Attorney for the Eastern District of Illinois, nor is there any proper or sufficient affidavit attached to or made any part of said information to show probable cause as required by law.

III. Because the affidavits attached to and made in support of the said information and the several counts thereof, are not sufficient to charge the defendants jointly nor to support the charge in said information or any count thereof of any joint action, or the commission of any criminal offense by joint action on the part of [fols. 29 & 30] the defendants of any law of the United States.

IV. Because the affidavits attached to said information and upon which affidavits the said information and each count thereof has been presented to the Court and a warrant issued thereon are not sufficient to authorize the issuance of any warrant against the defendants or either of them as has been done in this cause.

V. Because the affidavits thereto attached fail to show probable cause for the prosecution of the defendants for a violation of any law of the United States and are insufficient to support the information or any count thereof.

VI. Because the verification and authentication of each affidavit is insufficient to support the information and each count thereof.

VII. Because the affidavits thereto attached and each of them are not such and are insufficient to subject the affiants therein or either or any of them to the pains and penalties of perjury if the matter therein set forth and alleged are false.

VIII. Because the affidavits upon which such information tests were attached thereto after the said information had been filed.

IX. Because the original affidavits upon which the information was issued and upon which warrants for arrest were issued were made before a Notary Public and immediately before the case was called for trial the Government, by leave of court, amended the said original affidavit by causing the same to be re-executed and again sworn to before the Clerk of the Court.

D. E. Keefe, S. W. Baxter, Harold Baker, Charles A. Karch,
Attorneys for Defendants.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

Minute Entries of Trial

Now on this 31st day of March, A. D. 1924, comes the United States, the plaintiff in this case, by W. O. Potter, United States Attorney for the Eastern District of Illinois, and come also the defendants Henry Albrecht, alias Henry Albrecht Senior, Henry Albrecht, alias Henry Albrecht, Junior, Louis H. Oldenburg, Frank Ellis and Thomas Maher, each in person, and by Keefe and Baxter, Charles A. Karch and Harold Baker, their attorneys.

ORDER ALLOWING MOTION TO AMEND AFFIDAVIT TO INFORMATION

And now comes the United States Attorney aforesaid and enters motion to amend the affidavit to the information herein, which motion is by the Court allowed, to which ruling of the Court the defendants, by their said attorneys, then and there except.

ORDER GRANTING LEAVE TO REFILE MOTION TO QUASH INFORMATION

And now come the defendants, by their attorneys, and ask and are granted leave by the Court to refile motion to quash the information herein.

ORDER GRANTING LEAVE TO REFILE SUPPLEMENTAL AFFIDAVIT

And now comes the United States Attorney aforesaid, and asks and is granted leave by the Court to file a supplemental affidavit to the information herein.

ORDER DISMISSING CAUSE AS TO LOUIS H. OLDENBURG AND FRANK
ELLIS

And now comes the United States Attorney aforesaid and enters a Nolle Prosequi as to the defendants Louis H. Oldenburg and Frank Ellis, whereupon its is ordered by the Court that the said defendants, Louis H. Oldenburg and Frank Ellis, together with the sureties on their recognizance be and they are hereby discharged.

ORDER OVERRULING MOTION TO QUASH

And now the Court having heard arguments of counsel on motion to quash the information herein, overrules said motion, to which ruling of the Court, the defendants by their attorneys then and there except.

[fol. 32]

ORDER OVERRULING DEMURRER

And now come the defendants, Henry Albrecht alias Henry Albrecht, Senior, Henry Albrecht alias Henry Albrecht, Junior and Thomas Maher, by their attorneys, and enter a demurrer to the information herein, which said demurrer is by the Court overruled, to which ruling of the Court the said defendants then and there except.

PLEA OF NOT GUILTY

And now the said defendants, Henry Albrecht alias Henry Albrecht, Senior, and Henry Albrecht alias Henry Albrecht, Junior and Thomas Maher, being arraigned on the information herein for plea ther-to each says for himself that he is not guilty as therein charged, and issues being joined, the following named jurors are tendered and accepted, to-wit: Palmer Smith, Arthur Cameron, Buell Bess, Earl Canaday, Fred Albright, L. Becker, C. E. Hicks, William Warner, Walter Hughes, Albert Trainer, Charley Radebaugh, and Clay Moeller, who are duly sworn to well and truly try the issues joined in this case, and a true verdict render according to the law and the evidence.

VERDICT

And now evidence on behalf of the Government is heard and concluded, and at the close thereof comes the defendants by their attorneys, and enter motion for the Court to direct the jury to find the defendants not guilty, which motion is by the Court overruled,

to which ruling of the Court, the said defendants, by their said attorneys, then and there except. And now evidence on behalf of the defendants is heard and concluded. And now arguments of counsel having been waived, the jury, having heard the evidence and the instructions of the Court, retire in charge of a sworn officer to consider their verdict, and afterwards return into court and for verdict say "We, the jury find the defendants guilty in manner and form as charged in the information."

ORDER OVERRULING MOTION FOR NEW TRIAL

And now come the said defendants by their said attorneys, and enter motion for a new trial, which motion is by the Court overruled, to which ruling of the Court the said defendants, then and there except.

ORDER OVERRULING MOTION IN ARREST OF JUDGMENT

And now come the said defendants, by their said attorneys, and enter motion in arrest of judgment, which motion is by the Court overruled, to which ruling of the Court, the said defendants then and there except.

[fol. 33]

JUDGMENT

And now the said defendants, Henry Albrecht, alias Henry Albrecht, Senior, and Henry Albrecht, alias Henry Albrecht, Junior, being arraigned at the bar of the court for sentence, and they having nothing further to say why sentence should not be pronounced against them, It is therefore considered and adjudged by the Court that the said defendants, Henry Albrecht alias Henry Albrecht, Senior, and Henry Albrecht, alias Henry Albrecht, Junior, for the offense by them committed in manner and form as charged in the information, and as found by the jury in this case, each be imprisoned in the Vermilion County, Illinois, jail for the period of six months on each of the first, second and third counts of the information, that they each pay a fine to the United States in the sums of five hundred dollars (\$500.00), on each of the fourth, fifth, sixth, seventh, and eighth counts, and that they each be imprisoned in the Vermilion County, Illinois, jail, for the period of one year and to pay a fine to the United States in the sum of one thousand dollars (\$1,000.00), together with the costs of this prosecution, on the ninth count of the information; that execution issue therefor, and that the said defendants stand committed to the Vermilion County, Illinois, jail, until the amount of said fine and costs shall have been fully paid. It is further ordered by the Court that said imprisonment sentences run and be served concurrently. To which

ruling of the Court the said defendants then and there except and are given sixty days in which to file a bill of exceptions.

SENTENCE

And now the said defendant, Thomas Maher, being arraigned at the bar of the Court for sentence, and he having nothing further to say why sentence should not be pronounced against him, It is therefore considered and adjudged by the Court that the said defendant, Thomas Maher, for the offense by him committed in manner and form as charged in the information, and as found by the jury in this case, be imprisoned in the Vermilion County, Illinois, jail, for the period of six months on each of the first, second, third and [fols. 34 & 35] fourth counts of the information herein, that he pay a fine to the United States in the sum of five hundred dollars, (\$500.00), on the fifth, sixth, seventh and eighth counts of the information, and that he be imprisoned in the Vermilion County, Illinois, jail, for the period of six months on the ninth count of the information; that execution issue therefor, and that the said defendant stand committed to the said Vermilion County, Illinois, jail, until the amount of said fine shall have been fully paid. It is further ordered by the Court that said imprisonment sentences run and be served concurrently. To which ruling of the Court the said defendant then and there excepts and is given sixty days in which to — a bill of exceptions.

[fols. 36 & 37] IN UNITED STATES DISTRICT COURT

VERDICT—Filed March 31, 1924

We, the Jury, find the Defendants guilty in manner and form as charged in the information.

Wm. Warner, Foreman; Palmer C. Smith, Walter Hughes, Arthur Cameron, Earl Canaday, Charles Radebaugh, Buell Bess, L. Becker, Fred Albright, Clay Moeller, Albert Tramor, C. E. Hicks.

[File endorsement omitted.]

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION IN ARREST OF JUDGMENT—Filed March 31, 1924

And now come the defendants, in the above entitled cause, after verdict rendered, and move the court to arrest judgment and

sentence in said cause as to such defendants and each of them, and for reasons therefor, say:

I. Neither count of the information charges an offense under the laws of the United States.

II. Neither count of the information contains averments showing any joint or concerted action between or among any of the defendants in the alleged commission of the several offenses so charged to have been jointly committed.

III. There are no facts contained in any of the affidavits relied upon to support the several counts of the information showing any joint or concerted action between or among any of the defendants, in the alleged commission of the several offenses so charged to have been jointly committed.

IV. Each count of the information is insufficient because no Averements appear to show that the liquor alleged to have been sold, possessed, kept or bartered, was so sold, possessed, kept or bartered for beverage purposes, or were intended for use in the violation of the National Prohibition Act.

V. The information, as originally filed, pursuant to the order of the Court is insufficient because the same was not supported by a valid affidavit; the affidavit relied upon to support the said information having been taken and attested by a notary public of the State [fol. 39] of Illinois, unauthorized to do so, in criminal prosecutions under the laws of the United States.

VI. All affidavits in the record filed by the United States Attorney, by leave of Court, which were not appended to or a part of the information filed pursuant to the order of Court authorizing the filing of the original information, and filed after the defendants had been arrested on the warrant issued on the original information, are for those reasons null and void and do not support the original information and the warrant thereon issued; whereby defendants were required to be tried for and were convicted of criminal offenses, contrary to the provisions of the Fourth Amendment to the Constitution of the United States.

VII. The ninth count of the information contains no averment of specific facts showing by what manner or means, the act therein charged, constituted a common nuisance, and such facts as are alleged do not charge the offense of maintaining a common nuisance as defined under the National Prohibition Act.

VIII. Section 21 of the National Prohibition Act, purporting to create the crime of a common nuisance is unconstitutional and void, because the acts and transactions condemned thereby are not nuisances per se, and the congress transcended, in this enactment, its constitutional powers conferred by the Eighteenth Amendment to the Constitution of the United States.

IX. Neither count of the information contains sufficient averments to apprise the defendants of the nature or cause of the accusation, in derogation of the rights of the defendants by virtue of the Sixth Amendment to the Constitution of the United States.

X. Neither of the affidavits originally filed with, and relied upon, to support the said information, as originally filed, contain facts sufficient to show probable cause, to authorize the court to believe that the defendants, or any one of them had committed the alleged several offenses charged in said information, or in either of the counts thereof, and to cause a warrant thereon to issue for the arrest of said defendants, or either of them, all in violation of the rights of each of the defendants guaranteed them by the Fourth Amendment to the constitution of the United States.

[fol. 40] XI. Whereas, it appears, from the record in this cause, that a warrant for the arrest of defendants issued by an order of the court, as a process on the information in this cause, and that the warrant was, according to its tenor and mandate, served and executed by the United States Marshal of the district aforesaid, by arresting each defendant and bringing him into this Court to answer the charge in the said information, defendants say they were not required to answer and defend the charge in the said information contained, because the said warrant, or process, bringing them in court here, as well as all proceedings predicated thereon, are null and void, and the court is without jurisdiction of the cause and the defendants, for the following reasons to-wit:

(a) The affidavit relied upon by the Government to support the information is a nullity because the oath in said affidavit, made by each affiant, was administered, and attested to, by a Notary Public of the State of Illinois, having no authority, under the laws of the United States, to administer any oaths in connection with criminal prosecutions.

(b) And the said information, being unsupported by an oath or affirmation, as also the warrant, are null and void because violative of the Fourth Amendment to the Constitution of the United States to-wit:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Wherefore, Defendants' persons have been seized and arrested on a warrant not issued "upon probable cause supported by oath or affirmation" and particularly describing the persons being so seized and arrested and they are deprived of their right of being secure in their persons against unreasonable search and seizure, all in violation of the aforesaid Fourth Amendment to the Constitution

of the United States, a priori all proceedings in this cause are without jurisdiction and void.

XII. The purported amendment of the Information by re-executing the affidavits originally filed with the information, before the Clerk of the Court; and the further filing of additional affidavits, without leave of court for refiling the whole information as amended, and without a new warrant issuing and arrest thereunder; was an unlawful proceeding and such proceeding did not have the retroactive effect of validating the information as originally filed [fols. 41-43] defective because unsupported by a valid affidavit showing probable cause.

And such proceeding deprived the defendants of their rights and immunities under the Fourth Amendment aforesaid.

XIII. Counts 5th, 6th, 7th and 8th do not charge a crime because the statute upon which the same are predicated, viz. Section 3 of title II of the National Prohibition Act, in so far as it prohibits the mere possession of intoxicating liquor, is unconstitutional and void, the Congress not being empowered to so legislate under the Eighteenth Amendment to the Constitution of the United States, forbidding only the Manufacture, sale, transportation, importation and exportation of intoxicating liquor.

XIV. The verdict is defective in this that it is general on an information charging several and distinct crimes in the various counts thereof.

XV. Upon consideration of the whole record in this cause, the verdict of the jury cannot be legally maintained and judgment thereupon predicated.

Wherefore, the defendants and each of them, pray that judgment and sentence against them may be arrested.

Henry Albrecht, Sr.; Henry Albrecht, Jr.; Thomas Maher,
Defendants. D. E. Keefe, S. W. Baxter, C. A. Karch, H.
G. Bager, Attorneys for the Defendants.

[File endorsement omitted.]

[fols. 44 & 45] IN UNITED STATES DISTRICT COURT

BENCH WARRANT AND RETURN—Filed May 2, 1924

The United States of America to the Marshal of the Eastern District of Illinois, Greeting:

We command you, that you take Henry Albrecht, alias Henry Albrecht, Senior, Henry Albrecht, alias Henry Albrecht, Junior; Louis H. Oldenburg, Frank Ellis and Thomas Maher, if they be found in your district, and them safely keep, so that you have

their bodies before our Judge of our District Court of the United States for the Eastern District of Illinois, at the term thereof now being holden at Danville, in the District aforesaid, forthwith, to answer unto the United States of America in an Information for Violation of the National Prohibition Act, and have you then and there this writ.

Witness the Hon. Walter C. Lindley, Judge of our said Court, at Danville, in the District aforesaid, this 26th day of March, A. D. 1924, Marshall E. Daniel, Clerk. (Seal U. S. Dist. Court.)

UNITED STATES OF AMERICA,
Eastern District of Illinois, ss:

I have executed the within writ by arresting the within-named defendant- Henry Albrecht, Senior, Henry Albrecht, Junior, Louis H. Oldenburg, Frank Ellis and Thomas Maher at East St. Louis on the 27th day of March, 1924, and now have *his* body- in Court as I am within commanded, this 27th day of March, 1924.

James A. White, U. S. Marshal, by R. O. Shepherd, Deputy.

Marshal's fees, \$10.06.

[File endorsement omitted.]

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed May 2, 1924

And now come Henry Albrecht, Senior, Henry Albrecht, Junior and Thomas Maher, the defendants aforesaid, by his undersigned attorneys, and say that on the 31st day of March, A. D. 1924, this court rendered judgment against them in said cause, in which judgment and the proceedings had prior thereto, certain errors were committed, to the serious prejudice and damage of these defendants, all of which more fully appears from the assignment of errors herein.

Wherefore, these defendants pray that a Writ of Error may issue in this behalf to the Supreme Court of the United States, and for an order granting a supersedeas and stay of execution or proceedings pending the determination of such Writ of Error, and in that behalf admit the defendants to bail and to fix the amount of such bail, and for such further orders as will enable said Supreme Court of the United States to review and correct the errors complained of, and discharge these defendants, and append herewith their assignment of errors.

D. E. Keefe, H. G. Baker, S. W. Baxter, Charles A. Karch.

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 2, 1924

And now come Henry Albrecht, Sr., Henry Albrecht, Jr., and Thomas Maher, Petitioners and Plaintiffs in Error, by D. E. Keefe, S. W. Baxter, H. G. Baker and C. A. Karch, their attorneys, and in connection with their petition for a writ of error show that, in the record and proceedings and in the rendering of the judgment, decision and sentence of the District Court of the United States for the Eastern District of Illinois, in the above entitled cause, manifest error has intervened to the prejudice of these petitioners and plaintiffs in error, in this, to-wit:

I. The court erred in assuming jurisdiction of the cause and of the plaintiffs in error.

II. The court erred in granting leave to file the information and ordering a warrant for the arrest of the plaintiffs in error thereon to issue the same not having been supported by an affidavit showing probable cause in violation of the plaintiffs' in error rights under the 4th Amendment to the Constitution of the United States.

III. The court erred in permitting the government to reexecute, and to be resworn and re-attested, before the Clerk of the District Court, the affidavit filed with and relied upon to support the information as originally filed, pursuant to the leave of court granted on the 26th day of March, A. D. 1924, in derogation of plaintiffs' in error rights under the aforesaid Fourth Amendment.

IV. The court erred in permitting the government to file two additional affidavits on the 31st day of March A. D. 1924, after the information in the cause had been filed and the warrant for the arrest of the plaintiffs in error therein named had been issued and executed, and the cause being called for trial, which additional affidavits purport to be amendments of, and to be in substitution [fol. 48] of the original affidavit filed with, and relied upon, to support the information when originally filed and the said warrant for arrest issuing by virtue thereof, in violation of the plaintiffs' in error rights under the aforesaid Fourth Amendment.

V. The court erred in overruling the motion of the plaintiffs in error to quash the indictment interposed by the plaintiffs in error by their limited appearance for such purpose and determined by the court on the 31st day of March 1924, immediately prior to the trial of the cause, in violation of the plaintiffs' in error rights and immunities under the Fourth Amendment aforesaid.

VI. The court erred in overruling plaintiffs' in error motion in Arrest of Judgment.

VII. The court erred, in the course of the proceeding of the cause, in holding, as matter of law, that each of the several counts of the information are sufficient to charge an offense under the laws of the United States.

VIII. And the court so erred in holding that each of the counts of the information contain sufficient averments showing joint and concerted action on the part of all of the plaintiffs in error charged, in the alleged commission of the criminal acts charged.

IX. And the court so erred in holding that the affidavit relied upon to support the information originally as filed, is sufficient to support each of the counts of the information, in derogation of the rights, privileges and immunities of the plaintiffs in error and each of them under the Fourth Amendment aforesaid.

X. And the court so erred in holding that the affidavit filed with and relied upon to support the information as originally filed being null and void taken and attested to by a Notary Public might, thereafter, lawfully be amended by re-executing the same before the Clerk of the District Court, in derogation of plaintiffs' in error rights, privileges and immunities under the Fourth Amendment aforesaid.

XI. And the court so erred in holding that the affidavit as originally filed with the information might lawfully be withdrawn from the information and replaced or aided by new affidavits made [fol. 49] and filed March 31st, 1924, without making such new affidavits a part of the information and refiling the information with the said substituted affidavits as a new information upon leave of court first had, and issuing thereon a new warrant for arrest and executing the same, in derogation of plaintiffs' in error rights, privileges and immunities under the Fourth Amendment aforesaid.

XII. And the court so erred in holding that Section 21 of the National Prohibition Act is valid and constitutional, and not in excess of the power of Congress granted by the Eighteenth Amendment of the Constitution of the United States.

XIII. And the court so erred in holding that each count of the information is sufficient to apprise the plaintiffs in error of the nature or cause of the accusation, under the 6th Amendment to the Constitution of the United States, thereby depriving plaintiffs in error of the protection of said Constitutional provision.

XIV. And the court so erred in holding that the information as originally presented to the court and filed, by its leave, was supported by an affidavit sufficiently attested, and containing sufficient averments to show probable cause, and authorize the court to believe that the plaintiffs in error, or any of them, had committed the alleged several offenses named in the information, or either count thereof, and to cause a warrant thereon to issue for the arrest of the plaintiffs in error; and this contrary to the plaintiffs' in error rights, privileges and immunities under the Fourth Amendment of the Constitution of the United States.

XV. And the court so erred in holding that the plaintiffs in error be required to plead in, and defend in, the cause made by the information, notwithstanding that the information, as originally filed, was not supported by a valid and sufficient affidavit as required under the said Fourth Amendment, whereby the plaintiffs in error, and each of them, was deprived of his security against an unreasonable arrest guaranteed them under the Fourth Amendment, aforesaid.

XVI. And the court so erred in holding that, by amending the affidavit originally filed with the information upon which the warrant for arrest was issued, and, by filing additional affidavits, [fol. 50] the objection to the information as originally filed with a defective and insufficient affidavit, was obviated, and corrected the information so as to validate the previous arrest of the plaintiffs in error and authorize the court to exercise jurisdiction in the cause and over the plaintiffs in error, all in violation of the Fourth Amendment aforesaid.

XVII. The court erred in receiving the verdict and entering the same because same was defective, being general on an information containing several counts, each charging a separate and distinct crime, and the proof not sustaining each count as to all of the plaintiffs in error.

XVIII. The court erred in rendering judgment and sentence on the verdict because same is defective as aforesaid.

XIX. The court erred in imposing sentence on the 5th, 6th 7th and 8th counts charging crimes included within the remaining counts of the information; and thereby the plaintiffs in error were subjected to double jeopardy and punishment contrary to section four of the Fifth Amendment to the Constitution of the United States.

XX. The court erred in imposing sentence on counts 1st to 8th inclusive, because the crimes therein charged are included in the crime charged in the 9th count of the information; and thereby the plaintiffs in error are subjected to double jeopardy and punishment contrary to section four of the Fifth Amendment to the Constitution of the United States.

XXI. The verdict of the jury is not supported by any competent evidence in the record.

XXII. The court erred in each instance in denying each of the several motions for a directed verdict of not guilty, filed by the respective plaintiffs in error severally, at the close of all of the evidence on the part of the government.

XXIII. The court erred in overruling the demurrer to the information.

XXIV. The court erred in entering the judgment against the plaintiffs in error upon the verdict in this case.

XXV. The judgment of the court is contrary to law.

[fols. 51 & 52] XXVI. Upon the consideration of the whole record, the court erred in sustaining the conviction.

XXVII. Wherefore said plaintiffs in error pray that the judgment of the District Court of the United States may be reversed and held for naught, etc.

Dated this 2nd day of May, A. D. 1924.

D. E. Keefe, S. W. Baxter, H. G. Baker, C. A. Karch,
Attorneys for Petitioners.

[File endorsement omitted.]

[fols. 53 & 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—May 2, 1924

Now on this 2nd day of May, A. D. 1924, come the defendants, Henry Albrecht, Senior, Henry Albrecht, Junior, and Thomas Maher, in person and by Keefe & Baxter, Charles A. Karch and Harold Baker, their attorneys, and file and present to the court their petition for writ of error and assignment of error, and praying that the court may fix the bond on said Writ of Error, and that said bond may be made a supersedeas bond. Upon consideration thereof,

It is ordered by the court that Writ of Error, be, and the same is hereby allowed to have reviewed in the Supreme Court of the United States, the judgment entered herein, upon the plaintiffs in error giving Bond, instanter, conditioned according to law in the penal sum of Ten Thousand Dollars each, with surety to be approved by the court, said bond when so executed and filed to operate as a supersedeas in this case: and plaintiffs in error to enter into bond for security in the sum of \$7,500.00 each, excepting the said Thomas Maher, who shall give such bond in the sum of \$1,000.00 with security to be approved by the court.

And it is further ordered by the court that the plaintiffs in error, be, and they are given thirty days in which to file bill of exceptions, certified copy of the transcript of the record and all proceedings in said cause.

Walter C. Lindley, Judge.

[fols. 55 & 56] BOND ON WRIT OF ERROR FOR \$7,500—Approved and filed May 2, 1924; omitted in printing

[fols. 57 & 58] BOND ON WRIT OF ERROR FOR \$7,500—Approved and filed May 2, 1924; omitted in printing

[fols. 59-65] BOND ON WRIT OF ERROR FOR \$1,000—Approved and filed May 2, 1924; omitted in printing

[fols. 66 & 67] BAIL BOND FOR \$10,000—Approved and filed May 2, 1924; omitted in printing

[fols. 68 & 69] BAIL BOND FOR \$10,000—Approved and filed May 2, 1924; omitted in printing

[fols. 70-76] BAIL BOND FOR \$10,000—Approved and filed May 2, 1924; omitted in printing

[fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

Bill of Exceptions—Filed May 29, 1924

"Be it remembered that on the 31st day of March A. D. 1924, in the court aforesaid, the following proceedings in the above entitled cause, were had and determined to-wit:

The Court: Any preliminary Motions Gentlemen?

Mr. Karch: Yes your honor, on last Friday, Counsel for defendants filed in this court, a motion to quash the information.

Which motion is in words and figures as follows to-wit:

[fols. 78 & 79] MOTION TO QUASH INFORMATION AND WARRANT, APPEARANCE LIMITED—Omitted; printed side page 19 ante

[fol. 80] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Allen: I ask leave of the court to amend the affidavits now attached to the information by re-swearing the affiants before the Clerk.

The Court: Leave granted.

To which ruling of the court defendants except.

Mr. Allen: I will send them into the Clerk's Office and have them resworn there.

Mr. Karch: We object to that.

The Court: All right.

Mr. Karch: We filed in the Clerk's office last Friday a motion to quash which was intended to reach the information that was then on file. Now we desire to amend that motion by re-drafting same

to reach the amendments to the information that were just made, and refile same as amended.

The Court: You may do that. That is a motion to quash the information.

Mr. Karch: Yes, sir. I will read it.

And which amended motion is in words and figures following to-wit

[fols. 81 & 82] UNITED STATES OF AMERICA,
Eastern District of Illinois, ss:

MOTION TO QUASH INFORMATION AND WARRANT. APPEARANCE
LIMITED—Omitted; printed side page 25 ante

[fol. 83] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Karch: (Arguing the aforesaid amended motion to quash the information.)

The Court: Do you contend the government has no right to amend an information.

Mr. Karch: Yes sir.

The Court: You don't contend that is the law?

Mr. Karch: I understand that is the law.

The Court: The court does not so understand it.

The Court: These affidavits Mr. United States Attorney I think ought to show that the defendants are officers or employees of Albrecht & Company. These affidavits disclose the alleged fact that the liquor was purchased at the place of H. Albrecht & Company, that they purchased from H. Albrecht & Company, 328 East Broadway, St. Clair County, Illinois and does not disclose what connection Henry Albrecht, Senior, or Henry Albrecht Junior, or either of the [fol. 84] other defendants have with that company, does not show that they are connected in any wise with the commission of the alleged crime. The court will entertain a motion upon the part of the government for leave to file additional affidavits.

Mr. Allen: I will ask leave to file same instant, by that I mean fifteen minutes.

The Court: You may have that cross motion allowed.

To which ruling and action of the court defendants excepted.

Mr. Allen: I ask leave to file new affidavits and withdraw the old to keep the record clear.

Mr. Keefe: We would like to have leave to extend our motion to quash to the information with the amended affidavits.

The Court: Very well.

Thereupon the Government by Mr. Allen, Assistant United States Attorney presented to the court, the affidavits made under leave for

the cross motion, which affidavits are in words and figures as follows to-wit:

AFFIDAVIT OF OTTO TURLEY AND O. JONES—Omitted; printed side page 12 ante

[fol. 85] AFFIDAVIT OF J. A. MILLER AND D. P. COGGINS—Omitted; printed side page 13 ante

[fol. 86] Thereupon Mr. D. E. Keefe, one of the attorneys for defendants, argued and objected to the sufficiency of the information as amended by the substitution of the aforesaid amended affidavits.

The Court: The Government nollies as to Oldenburg and Ellis.

Mr. Allen: Yes sir.

The Court: The motion to quash will be denied and exceptions allowed.

Mr. Karch: We now desire to file and present for argument, a demurrer to the information.

The Court: The demurrer may be filed.

Which demurrer is in words and figures as follows to-wit:

[fols. 87 & 88] DEMURRER—Omitted; printed side page 28 ante

[fol. 89] Which demurrer was then and there overruled by the Court.

To which ruling and action of the Court defendants except.

[fol. 89a] Whereupon the government, to sustain the issues on its behalf, introduced the following evidence:

OTTO TURLEY, being first duly sworn, testified as follows:

Direct examination by Mr. Allen:

My name is Otto Turley. I live at 907 East Seventh Street, East St. Louis, Illinois. I know the place of business of Henry Albrecht and Company at 328 East Broadway, East St. Louis, St. Clair County. I have been there a number of times. I know Henry Albrecht, Sr., Henry Albrecht, Jr. and Thomas Maher and I knew them on or about February 16 of this year. I believe I was in the place of business of Henry Albrecht and Company on February 16 of this year, I can tell by the name on the bottle.

Mr. Keefe: I object to his examining the label on the bottle unless he made that himself.

The Witness: I have a copy of the label that is on the bottle if that is one of them—February 16, 1924.

The room I judge it to be about 75 feet deep, that is long and about 30 feet wide. The bar sets on the left hand side as you walk in the door. On the right hand side near the front is a cigar stand and behind that cigar stand there is a toilet and then further back about the end of the bar on the right hand side is the cashier's cage and there is a partition right by the cashier's cage that runs all the way through. That partitions the room off from the saloon, I call it a warehouse and at the far end is a telephone booth. On the right side of the bar at the extreme end of the saloon is the cashier's cage, it is not on the same side of the room as the bar; it is on the right hand side. The bar is on the left as you walk in. Back of the bar is a back bar. There is a partition in the back and the cashier's desk is right against it. I saw Henry Albrecht, Sr. in the cage on February 16 when I was in there. He was standing near the back end of the bar right next to me and there was four or five other fellows standing towards the end of the bar with him along up the bar [fol. 90] being served, by Mr. Maher. He was carrying colored spirits that is the same color as the stuff which we drank in there out in whiskey glasses out of the rear room. Mr. Maher was carrying them. I did not have any transactions with Mr. Maher when I first went into the place. When I first went into the place I went to the cashier's cage and young Albrecht was in the cashier's cage, I signed the check there and asked him to cash the check and he cashed the check for me. The check called for \$82.74, he gave me \$82.00 in paper money and a half dollar and a 25¢ chip, that is the 25¢ chip would have been 1¢ more than was really coming to me and then I goes to the bar with Mr. Jones and calls for the drinks, drinks of whiskey, and he goes to the back room. Mr. Maher went into the back room. He carried out two whiskey glasses full of whiskey and served it to Mr. Jones and I. We drank it, it was whiskey, it was intoxicating liquor and it was fit for beverage purposes. Henry Albrecht, Sr. was standing right next to me when I came up to the bar. I ordered whiskey and drank it.

Q. Now you may state where Mr. Maher got the liquor if you know that was served to Mr. Albrecht and the men with him.

A. Well as to who the fellows are which he were in conversation with, that is Mr. Albrecht, Sr., I don't know all of them, but the whiskey which Mr. Maher carried out of the rear room where he carried the one which was served to us, the two which was served to us, he carried them out in whiskey glasses, the same way he carried ours out from behind the partition.

I drank the whiskey straight and used a little soda for a wash. The other men had their drinks mixed with soda or ginger ale in the way of a highball. I paid Mr. Maher one dollar for the two drinks. I was not in there again that day. After I bought the two drinks, I called for a half pint and he went into the rear and filled up a half pint bottle or got one already filled up and delivered

it to me and I gave him a five dollar bill and on return of the change he gave me, we had a bottle of soda there, I received change of two one dollar bills and a quarter, the soda must have been a special [fol. 91] brand for he charged for it and gave me back \$2.25. I have seen the bottle which is marked Government's Exhibit 1 before. That is the bottle that I bought on that day February 16. The contents on that label are in my hand writing, I signed it and Mr. Jones signed it. I examined the contents of the bottle that day. I taken the cork out of it when I got to the office and touched my tongue to it and in my own judgment, I suppose it was the same proof that I drank, it tasted like it. It tasted like the stuff I drank over the bar, not any higher proof or lower proof, I don't think. I turned this bottle over to Mr. Earl Gibson and it was in the exact condition as it was when I received it except I put this on here signed by myself and Mr. Jones. The contents of it was the same.

This was in the County of St. Clair, State of Illinois, City of East St. Louis.

I were there on another day after that. I judge about six or eight days after that and when I were there I called for a drink of whiskey and was refused and had a drink of root beer. The 16th was the first and last time I made a buy there. I had no conversation with Mr. Henry Albrecht, Sr.

Cross-examination by Mr. Keefe:

It was about 5:10 P. M. when I went in there. I made a memorandum of the time of day at the time I made the purchase.

Q. Why did you make the memorandum?

Mr. Allen: Objected to as immaterial.

Mr. Keefe: I want to show it for the purpose of showing he has an interest in the prosecution of this case.

The Court: I suppose he went in there for the purpose of buying liquor and kept it for the purpose of testifying, I don't think it is material but he may answer.

Q. Why did you make a memorandum, the court said you may answer?

A. May I answer it in my own way. Because I have been in several different places, been connected with different courts and cases and if you don't keep the exact time on a thing the defense might [fol. 92] product an alibi. When I went to get the liquor, I went in for the purpose of ultimately prosecuting the case in court. That was my objective purpose the first time I went in.

I judge the room, in which I speak about the bar, is about 75 feet in length, it is not as long as this building is this way. The general direction of that room, which I would call north and south is about 75 feet long and I judge the width to be in the neighborhood of around 30 feet. The cage, cashier's cage, is situated at the rear end of the saloon room. It is to the right hand side, right near the end of the bar, the south end of the bar. It is west of the south end of the bar, it isn't directly west, the general direction is west. It is in

the neighborhood of about 8 feet away. I judge something like that from the bar, I didn't measure it. Henry Albrecht, Jr. was inside of the cage. He didn't remain there all the time I was in there. I didn't time him but after he cashed my check he was out in the back—to get into this cage you got to go by the partition, when you come from the partition you come behind the bar or you can step into the barroom, either one, he made a trip or two behind the bar and in the rear room where the whiskey was carried by Mr. Maher. I judge I remained in there about 15 minutes but I didn't keep track of the time and cannot say how many times he came in or out of that cage.

I was in there for the purpose of getting my check cashed and getting whiskey.

Q. And for the purpose of ultimately prosecuting the case, that is right?

The Court: He said that before.

Q. Were you an officer of the government of any kind at that time?

Mr. Allen: Objected to.

The Court: He may answer.

A. No sir.

Q. Were you acting in conjunction with any organization at that time?

[fol. 93] Mr. Allen: Objected to.

The Court: Sustained.

To which ruling and action of the court defendants except.

I turned the bottle, and its contents, over to Earl Gibson, who is a gentleman, all I know.

Q. Is that the first time you ever knew Gibson when you turned over this bottle and its contents to Gibson?

Mr. Allen: Objected to.

Mr. Keefe: I want to show what the purpose was.

The Court: Objection sustained.

To which ruling and action of the court defendants except.

Gibson was in this Metropolitan Building when I turned the bottle and its contents over to him. I don't know just how far the Metropolitan Building is from Albrecht's place. It is a distance of from Broadway over to Missouri Avenue, it is 2 blocks counting Division Avenue, but Division is a very short street and then a block about you might say, approximately, up Missouri Avenue a distance of about 3 blocks.

Q. Before you went into the Albrecht place had you any arrangement or understanding with Gibson that you were to go there and try to get liquor and then turn it over to him?

Mr. Allen: Objected to.

The Court: Sustained.

To which ruling and action of the court defendants except.

The writing that is on the label around the bottle is my writing. I wrote it about 10 minutes after I made the purchase. Mr. Jones wrote his name himself, I believe. He remained with me in Albrecht's all the time I was there. We went in together and went out together. We never talked about purchasing whisky or liquor and turning it over to Gibson before we went in there.

Q. Was there any understanding between you and Jones when you went in there together that you would get liquor if possible and turn it over to Gibson?

Mr. Allen: Objected to.

[fol. 94] The Court: Sustained.

To which ruling and action of the court defendants except.

It was about 10 minutes and a few seconds, I guess, after I got the bottle and its contents and turned it over to Gibson. The next time I saw the bottle was here in Danville. I taken the cork from the bottle and tasted the contents with my tongue on the 16th of February, 1924, the same evening I bought it. I haven't seen it until the present time, I know I haven't tasted of it here.

Q. You don't know whether the contents in that bottle now are the same you purchased or not, do you?

A. It is the same color and it seems the same to me.

Q. That is not my question.

Mr. Allen: I object to the question, he couldn't know.

The Court: It is not cross examination, he wasn't asked anything about that in chief.

Mr. Keefe: Then your honor holds it is improper?

The Court: I do, didn't I practically say so.

To which ruling and action of the court defendants except.

I have not talked with any body out side of the Government's attorney about this case. I know Louis Goldberg in East St. Louis for the last 20 years or better.

Q. I will ask you if on yesterday afternoon, which was Sunday, you didn't have a conversation with Mr. Goldberg in the City of East St. Louis at his place of business on Collinsville Avenue and if he didn't there say "why are you going—"

Mr. Allen: Object to any of that conversation.

Mr. Keefe: I am just asking the question, I have not finished the question.

The Court: The court is rather interested in this and will be glad to hear it.

Q. "Why are you going ahead with this case" and if you didn't say "The reason I am taking an interest in it is because Albrecht caused me to lose my job once"?

A. No, I don't remember having any conversation with Mr. [fol. 95] Goldberg, I have no reason, Albrecht—

Q. It don't make any difference about the reasons—you say you had no such conversation yesterday afternoon, which was on Sunday?

A. I did not, I talked with Mr. Goldberg yesterday afternoon.

Q. The conversation I have asked you about, you didn't say that or that in substance, what I have asked?

A. No sir.

Redirect examination by Mr. Allen:

With reference to the cashier's cage and Mr. Maher going to the back room, in going back and forth from the bar where he was serving trade, to the back room and coming back from the back room to the bar, he was not in my view all the time for when he goes back of the partition I couldn't tell where he was. Mr. Maher did not pass back and forth in front of cashier's cage in going to the back room. There is a door leading in from behind the bar into the rear room or warehouse there, whatever they might call it. The door leading from the back of the bar into the barroom at the back is in the same partition that runs up and here sits the cashier's cage right here (indicating). The cashier's cage is on the west side of this partition, part of it would extend north, I don't know how much extends back of the partition but there is a little part of it I judge about three or four feet deep and I judge it to be about six or eight feet the other way. Between the cage and the bar is a door leading into the back room and into the main part of the barroom and then in the back of the bar is another door which leads from that part of the bar to the back room and the telephone, there is a public telephone booth there.

Q. Now was Mr. Albrecht, Jr. in this cage or desk at the times that Mr. Maher was going back and forth to the back room to get whiskey which you have identified which you testified about?

A. Could Mr. Albrecht, Jr., see him?

Mr. Keefe: Objected to that and submit—

A. Yes sir, he were behind the bar.

[fol. 96] Mr. Keefe: Just a minute, let me object, it is testifying to a conclusion.

The Court: You better wait until he gets through with his statement, I don't know how much of it is conclusion, he was asked to tell if defendant Albrecht, Jr., was in this cage when the man went back and forth, that is the question.

Mr. Keefe: I wasn't objecting to that.

The Court: If you object to the answer, wait until he gets through with the answer.

Q. Was the defendant Henry Albrecht, Jr., in the cage at the time Mr. Maher went back and forth in there getting and serving the drinks?

Mr. Keefe: Leading and suggestive.

The Court: He may answer.

To which ruling and action of the court defendants except.

A. When he went to get the two first drinks before I purchased the pint, the half pint, Junior were in the cage.

Mr. Maher was within sight or view of Mr. Henry Albrecht, Jr., at the time he made those trips, he could see him.

Examination by the Court:

I judge I was standing about ten feet from this cage when I got this liquor. I was about eighteen inches from Albrecht, Sr., when served with these drinks. I was about the same distance from Albrecht, Sr., when I got that one half pint bottle and Albrecht, Jr., was near the front end of the bar, behind the bar. He could look through the screen at the time I received the two drinks and the screen was the only thing between them. The structure of that cage is of little bars. I meant when I said that this liquor was intoxicating was that if you drank enough of it, it would make you drunk. I have had experience in drinking liquor and I can tell whether it runs more than one half of one per cent of alcohol by volume. I have handled a good deal of whiskey in my life. I would say that the liquor I drank to be about ninety proof, that [fol. 97] would be what they call ninety proof of spirits which means ninety per cent alcohol.

OVIS JONES, being first duly sworn, testified as follows:

Direct examination by Mr. Allen:

My name is Ovis Jones. I live at 2740 Bond Avenue, East St. Louis. I know where the place of business of Henry Albrecht and Company is and I know where it was the 16th of February of this year. I was in there at that time, on the 16th of February at 5:10 in the afternoon with Otto Turley, who is the gentleman who was just on the witness stand. Me and Mr. Turley went in and he walked to the booth or cashier's cage or whatever you call it to get his check cashed and I walked over to the bar and when he got his check cashed, he came over and called for a couple of drinks of whiskey and the bartender that was on duty went back in the rear room and got them and came back out and Turley gave him a \$1.00 bill and this chip good for 25¢ in trade and got a quarter back in change and Turley says "That's pretty good stuff, let's take a half pint of it" and I says "all right" and he told the bartender he wanted a half pint of it and the bartender retired to the back room through the door that swings backwards and forwards and got

that half pint for us. He rung the money up in the cash register. I have seen the bottle marked Government's Exhibit 1 before. It was delivered to us when we called for a half pint of whisky in the place of business of Henry Albrecht, by Mr. Maher, if that's the gentleman's name. I drank the drinks that I got, and according to my judgment, it was intoxicating liquor and it contained more than one-half of one percent of alcohol by volume and was fit for beverage purposes. I saw Henry Albrecht, Sr., that day. He and some more parties were at the rear of the bar drinking some kind of drinks, I don't know what it was, but it was mixed up in a glass. Turley was between me and Henry Albrecht, Sr., and we were reasonably close standing room, I guess Mr. Turley and me were as much as a foot apart and then Mr. Albrecht, he was [fol. 98] right close to Mr. Turley, the exact distance would be hard to tell but I would judge Turley was about a foot from him and I don't think I was over that far from Turley. Mr. Maher was waiting on other customers as they would come in but I did not see any one pay Maher anything for the drinks which he took to Mr. Albrecht nor did I see any one pay him. Well, I didn't see Henry Albrecht, Jr., when we called for one-half pint, when the bartender went in the rear to get it when he came out right immediately after he came out young Albrecht came out from back that way somewhere too, and went on up toward the front end of the bar. At the time I left, he was in behind the bar but the exact location, I can not say because it is a real long bar, but he was in the place of business.

I was in there again the 27th of February with Mr. Coggan who went in there with me. Mr. Maher, if that is the gentleman's name, was behind the bar at that time, it is the same man. We went in called for drinks of whisky and was served with whisky by the bartender. Mr. Coggan paid for it. He gave him one dollar but didn't get any change. Mr. Maher rung it up in the cash register. It tasted like the other. I was pretty good whiskey, if I am any judge of whisky and I would say it was intoxicating liquor for beverage purposes and contained more than one-half of one percent of alcohol by volume. We called for a half pint and he repaired to the back room or back quarters somewhere behind the door marked "private" and came back with a half pint. That was on the 27th at 9:30 in the morning. To the best of my knowledge it is the bottle that I got in there at that time. I signed the label on the bottle. I think I wrote the writing on the label, looks like my writing very much. I did not sample the contents of that bottle when I got it, nor did I ever sample the contents of it. I taken it up to the office in the Metropolitan Building and delivered it to Earl H. Gibson. At the time I delivered it to Gibson, the contents were the same they were when I received it from Mr. Maher. I was at this place again that afternoon, later on that day, along about somewhere between one and two-thirty I [fol. 99] call it or after dinner. I went back with Mr. Coggins. We went in and tried to buy some more and they said they didn't

have any. Young Albrecht was behind the bar at that time. Well, not anything was said on the 27th. The two dates I have testified to when I went in with Mr. Turley on the 16th and Mr. Coggins on the 27th were the only times I purchased liquor there and all of these sales were made in the County of St. Clair and State of Illinois.

Cross-examination by Mr. Keefe:

I have lived in East St. Louis four years the 29th of last September. I am a laborer at the Aluminum Ore. About the 27th of February I had a fifteen day lay off, I wasn't pretending to work. Coggins and I went into Albrecht's together to get whiskey to be used as evidence and during the time I was off at the Aluminum Ore—fifteen days—the St. Clair County Clean Up League paid me.

After I got this bottle and its contents, I went to the office the St. Clair County Clean Up League used at that time in the Metropolitan Building, with Coggins. The writing done on these bottles was done as soon as we got out of the building. I had a note book in my pocket and put down the time of day, the amount of money we gave them, the kind of stuff we got, where it was kept and when I got to the office I wrote the copy you see around the bottle and made a carbon of it and I have the carbon in my pocket. The writing on the label was done at the office. When we first went in on the 27th of February it was about 9:25 and about 9:30 when we came out, we were in there altogether, about five minutes, it was in the morning. We called for a drink, when we were served the drink and half pint we went out together, I judge about five minutes, all told, and when the whiskey was delivered to us, I pulled out my watch and looked at the time and I says we better go it is 9:30 now; I did that to call Mr. Coggins attention to the time of the day.

The bartender was behind the bar and he was the only one waiting on us. Young Albrecht was in the place but he was not having anything to do with waiting on us. Maher waited on us but when he went back to get the whiskey, young Albrecht went back with him, on the morning of the 27th. Maher went first and young Albrecht went right back after him. I don't know whether they went to the [fol. 100] same place or not for when the door was shut, it shut off my view.

DAVID COGGINS, being first duly sworn, testified as follows:

Direct examination by Mr. Allen:

My name is David Coggins. I live at East St. Louis, Illinois. I know where the place of business of Henry Albrecht and Company is. I was there on the 19th with Mr. Miller. We saw Thomas Maher, the bartender, and asked for a drink of whiskey from him. He went to the back room and came out with two glasses in his hand and served us with the drink. They were little whiskey glasses and we drank the contents. It was colored moonshine and was in-

toxicating and fit for beverage purposes. I don't know what the alcoholic content is. But it had a lot more than one-half of one percent of alcohol by volume. We paid 50¢ a drink to the bartender. He took a five dollar bill and rang it up and gave us the change. I don't believe I saw either of the Albrechts in there.

We asked Mr. Maher for one-half pint of whiskey, but he said he couldn't give it to us right then he was short, to come back after a while and they would have a supply on hand. We did not go back that day but went back the next day and Mr. Maher and Albrecht, Jr., were there at that time. We went in and asked for a drink of whiskey from the bartender and got it. He served us two glasses which he got from the rear room and charged us 50¢ a drink. It was two glasses of whiskey and was intoxicating and contained more than one half of one percent by volume, fit for beverage purposes.

I think young Albrecht was up at the front part of the saloon over by the cigar counter and not behind the bar. We were in his sight all the time.

We asked Maher for a half pint of moonshine and got it, and I suppose Government's Exhibit 2 is the same one. I have seen the label before but I don't know just who wrote it. It was given to me to read and I read it and signed it. We took this bottle to the office of the Clean up League and turned it over to Earl Gibson. The contents were the same at that time as when we received it from Maher.

[fol. 101] I bought another bottle there on the 27th of February when I went in with Mr. Jones. Albrecht, Sr., Albrecht, Jr., and Maher were in there at that time. Maher was behind the bar. Albrecht, Sr., was in front behind the bar in the front part of the saloon but was not doing anything in particular. Albrecht, Jr., was in the rear of the bar at the end of the bar.

We walked in there and asked for two drinks of whiskey from the bartender. We paid him 50¢ a drink. He got the liquor from the rear room and served it to us in two small whiskey glasses. He rung the money up. We bought another half pint of whiskey and I suppose that Government's Exhibit 2 is it. It looks the same. We paid \$2.50 for it to Mr. Maher. I just don't know whether he put the money in his pocket or rung it up. After we bought this bottle, Jones and I took it to the office of the Clean Up League to Mr. Gibson. The contents of the bottle were the same as when we bought it from Maher. Jones wrote the label on #2 in my presence and it was fastened to the bottle but I don't remember whether the same thing is true with reference to Exhibit 3. All sales were made in the County of St. Clair and State of Illinois.

On this last occasion I was in the sight and view, while all this took place, of Albrecht Sr., who was at the front end of the bar, Albrecht Jr., who was at the rear end of the bar and Mr. Maher. In going back to the back room Maher had to go about two or three feet from Albrecht Jr., who was standing right at the outside of the bar at the end. Albrecht Jr., went into the room after Mr. Maher. Mr. Maher came out first but I didn't notice whether Albrecht Jr., came out after Mr. Maher did or not.

Cross-examination by Mr. Keefe:

The first time I went in was the 19th and again on the 20th and again on the 27th. Before I went in on the first time, I was not paid anything no promises made by anybody, if I could succeed in getting whiskey.

I went to the office where Gibson was when this bottle and its contents were taken there. I did not do any of the hand writing. I signed my name in the office of the Clean Up League—508 Metropolitan Building. Jones was with me. I was there on the 19th and 20th with Mr. Miller.

[fol. 102] Q. After having procured this bottle, whatever was in it, why did you take that to Gibson?

Mr. Allen: Objected to.

The Court: Sustained.

To which ruling and action of the court defendants except.

I had talked to Mr. Gibson before I went to Albrecht's.

Q. Had a plan been discussed between you and Gibson with reference to how you might be able to procure whiskey at Albrecht's?

Mr. Allen: Objected to.

The Court: Objection sustained.

To which ruling and action of the court defendants except.

Q. With reference to getting whiskey at Albrecht's, did Gibson suggest any method for you to follow in order that you might be able to get whiskey there?

Mr. Allen: Object to that.

The Court: Objection sustained.

To which ruling and action of the court defendants except.

Q. Is Gibson an officer of any kind that you know of?

Mr. Allen: Objected to.

The Court: Sustained.

To which ruling and action of the court defendants except.

I was not an officer of any kind when I went in to Albrecht's on the 19th and I guess I was not on the 27th, there is some controversy as to whether the members of the constabulary are officers or not. I am a member of the Department of Constabulary and was such when I went in on the 27th and when I went in I had in mind the purpose of endeavoring to get liquor in there that there might be a case prosecuted against Maher or the Albrechts.

J. A. MILLER, being first duly sworn, testified as follows:

Direct examination by Mr. Allen:

My name is J. A. Miller. I live at 1611 Illinois Avenue, East St. Louis, Illinois. I know where the place of business of Henry Albrecht and Company is, I have been there. I was there on the 19th and 20th with Coggins. I seen the bartender the first day is all. I asked for a couple of drinks and he gave it to us. He went to the back room behind the screen to get them and brought them out in whiskey glasses which he put on the bar and which I paid for at 50¢ a drink. He put the money in the cash register. I drank the liquor. It was whiskey good as I can tell. I am familiar with whiskey and I know it was intoxicating liquor and contained more than one half of one per cent of alcohol by volume.

We tried to buy a half pint, he said he didn't have none to come back the next day, said they had gone after some, and young Albrecht and the bartender were there. We bought two drinks and one half pint from the bartender. He got them in the back and brought them to us in whiskey glasses and we drank it. It was the same kind of whiskey that we got the day before and I paid him for it. Coggins was with me.

Henry Albrecht, Jr., was at the front end near the cigar case and there was nothing between us and Mr. Albrecht. I could see him and he could see me. We bought the half pint on the 20th. The bottle marked Government's Exhibit 3 is the bottle, I signed my name to that bottle as quick as I got back to the office with it, and the bottle was not out of my sight from the time I received it at the Albrecht Place until I got to the Metropolitan Building. I turned the bottle over to Mr. Gibson and the contents were the same as when I received it from Maher. When we got back up there we tasted it and it tasted the same as the whiskey we drank before. I was never there at any other time. That is the only bottle I bought and it was bought in the County of St. Clair and State of Illinois. I paid the money to the bartender and he put it in the cash register. Albrecht Jr., was standing in the view of the cash register at that time.

Cross-examination by Mr. Keefe:

Albrecht Sr., was about fifteen or twenty feet away from Coggins and me. There is no screen in front of that place. Albrecht was standing near a case similar to a cigar case but he was not selling [fol. 104] cigars to anyone. It was a little after four in the afternoon. We remained there just long enough to get our drinks of whiskey and get out.

Before we went in there the first time we had not been paid or offered anything to go there and endeavor to get whiskey by anybody. We were instructed by Mr. Gibson to take the bottle and its contents to his office. The instructions were given on the same evening. I did not do any of the writing on the label. My business at that time was that of a millright and was the same when I went in

with Coggins. Coggins was with me when I got the instructions from Gibson the first time for he and I to go down to Albrecht's together. Coggins carried the bottle from Albrecht's in his coat pocket. He did not have any other bottles, he wouldn't have had any. He came from the post-office right there and he never had any more, I know. He hadn't been in the habit of carrying them I don't think. He just got off from work at the post-office and he wouldn't have whiskey at work with him. He is a mail-carrier and had his uniform on at that time. On the 20th when we were there the bottle and contents given by Maher and taken by Coggins and put in his pocket. There was but one bottle bought on the 20th, there was no bottle bought on the 19th. Coggins had his overcoat over his postal uniform the first day and had a cap on that indicated his position.

EARL H. GIBSON, being first duly sworn, testified as follows:

Direct examination by Mr. Allen:

My name is Earl H. Gibson. I have seen the bottle marked Government's Exhibit 1 before at 508 Metropolitan Building on February 16th. I received it from Otto Turley and Ovis Jones who have testified here. I have seen Government's Exhibit 2 and I received it from Coggins and Jones. I have seen Government's Exhibit 3 and I received it from Coggins and Miller. I received the bottles on the dates as indicated on the labels, which were written in my presence and were attached to the bottles. Upon receiving the bottles, I placed them in the safe and later delivered them to Mr. Wolcott, the Assistant United States Attorney at E. St. Louis. At the time I delivered them, the contents were the same as when I received [fol. 105] them.

Cross-examination by Mr. Keefe:

No one else had access to the combination safe. I was the only one with the combination.

GEORGE M. SCRUGGS, being first duly sworn, testified as follows:

Direct examination by Mr. Allen:

My name is George M. Scruggs. My official position is Group Chief Federal Prohibition Agents at East St. Louis, Illinois. I am employed by the United States Government. I have seen the bottles marked Government's Exhibits 1, 2 and 3. I got them from Mr. Walcott, Assistant District Attorney of E. St. Louis, and upon receiving them, I put them in the vault in the Federal Building in E. St. Louis, Ill. They were placed alphabetically in a separate place to themselves. I removed them from the vault and turned two of them over to Walcott. I don't know who packed them. The

contents looked to me to be the same when I turned them over to Walcott as when I received them.

Cross-examination by Mr. Keefe:

I carry the key to the vault in the Federal Building, E. St. Louis. No one else has access to it. I got the bottles from Walcott and put them in the vault. I don't know anything about Walcott's being in possession of them. My identification is made by the labels or writing on the bottles. One of the bottles we could not find at the time we made a search for it, there were known to be three sample bottles but we overlooked one. In going back over and placing this stuff alphabetically into the vault to itself we found the one bottle, which had been among the other bottles in the vault. I don't know whether we put the bottles in together or they were just in a bunch of bottles. The only way the labels were secured on the bottles was by rubber bands. The missing bottle could not be found when they were to bring them up before the Grand Jury and we were unable to find it but a few days later I built a separate vault in the basement and put the stuff up alphabetically and found the bottle. There were two other men helping me at the time which was last week.

[fol. 106] Redirect examination by Mr. Allen:

The men helping me were not prohibition agents, they were the men that brought the "buys" in. I found the bottle myself and I had the only key to the vault. The third bottle was in the vault when I found it and I remembered I placed it there. I remembered the occasion of receiving what were called the "Albrecht buys" and I turned them back to Walcott and I know nothing further about the bottles. I was in the business place of Albrecht and Company on the 27th of February.

Q. What was your business there?

Mr. Allen: Objected to.

The Court: Sustained.

To which ruling and action of the court defendants except.

One of these bottles was turned over to some one else. It was the missing one that had been in the basement in E. St. Louis. I was the one that turned it over.

WILEY M. HALL, being first duly sworn, testified as follows:

Direct examination by Mr. Allen:

My name is Wiley M. Hall, Federal Prohibition Agent, I have been one for several years. I packed two of the Exhibits in the vault at E. St. Louis. It was the same vault described by Mr. Scruggs who was with me part of the time. I saw Mr. Scruggs hand

the two bottles to Walcott and he gave them to me and I packed them. They was not out of my sight from the time Mr. Scruggs turned them over until I packed them in the box. The contents were the same when I packed them as when Mr. Walcott received them from Mr. Scruggs. I unpacked the boxes in the United States Attorney's office in Danville and they were in the same condition when I unpacked them as they were when I packed them. The contents were the same. I turned them over to Mr. Gannon or to Mr. Allen.

J. A. GANNON being first duly sworn testified as follows:

Direct examination by Mr. Allen:

My name is J. A. Gannon, Clerk in the United States Attorney's office, for the Eastern District of Illinois. I have seen the bottles [fol. 107] marked Government's Exhibits 1 and 3 before. I saw them about two weeks ago in the store room of the United States Attorney at Danville. They were turned over to me by Wiley M. Hall, the prohibition agent. They have been in my custody from that date to this and the contents were the same as when I received them.

Cross-examination by Mr. Keefe:

Mr. Allen was the only one who had access to that room besides myself, to my knowledge. It is a room that has a door with a lock and key and no one besides Mr. Allen and myself have a key to that room.

PAUL W. SIMONDS, being first duly sworn, testified as follows:

Direct examination by Mr. Allen:

My name is Paul W. Simonds, Internal Revenue Chemist employed by the United States. I am able to determine the alcoholic contents of liquor. I have examined the contents of Government's Exhibits 1, 2 and 3 in the United States Attorney's office about 1:30 today. They are all three about the same, about 45% alcohol by volume and about 90 proof and are intoxicating and fit for beverage purposes.

Cross-examination waived.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Allen: We offer in evidence Government's Exhibits 1, 2 and 3.

The Court: They may be received.

Mr. Keefe: We object to them for the reason that these are shown to have been taken to the office of Mr. Gibson and by Mr. Gibson

turned over to Mr. Walcott and by Mr. Walcott turned over to the others as has been detailed here by the officers; I don't think that there has been any sufficient proof here that the contents of these bottles as it came from Albrecht & Company according to the witnesses is the same contents as it now is.

The Court: What evidence is there to the contrary?

Mr. Keefe: If we put it on that ground there wouldn't be any, but I take it that is not sufficient——

The Court: The direct evidence is that these men took them to [fol. 108] Gibson and Gibson's testimony is that they remained in the same condition and he turned them over to Walcott, isn't it?

Mr. Keefe: Yes sir.

The Court: Scruggs testifies that he received them from Walcott and that from that time on they were in his custody and that he turned them over in the same condition back to Walcott and Hall says at the request of Walcott he received them and packed them and they have been in the same condition, that is, he didn't change them, came to Danville and put them in the custody of the United States Attorney. Now do you mean to say that there has been no showing that there was no change by Walcott or Allen?

Mr. Keefe: I don't charge Mr. Walcott changed them, but I mean to say that the government must connect——

The Court: What I am getting at is where is there any failure to connect?

Mr. Keefe: During the time it was in the possession of Walcott, turned over from Walcott to Scruggs.

The Court: That is when it was in possession of Walcott; that is what I am getting at. Do you mean to say that the Government must prove that Walcott didn't change them?

Mr. Keefe: I am insisting on this, there is one interval not connected up.

The Court: What is that interval?

Mr. Keefe: From the time Gibson turned it over from Gibson to Walcott.

The Court: If you want to insist on that, I will adjourn this case until tomorrow morning and telegraph Walcott to be here.

Mr. Allen: I will ask that to be done.

Mr. Keefe: I am directed to withdraw that objection.

The Court: All right—objection withdrawn. Is there any further evidence for the government?

Mr. Allen: The government rests.

DEFTS' MOTION FOR A DIRECTED VERDICT AND ORDER OVERRULING
SAME

Mr. Keefe: Now at the close of the government's case, come the defendants and move the Court to instruct the jury to find the defend- [fol. 109] ants and each of them not guilty as to each and every count in the information, and we request the Court that this motion

be considered for the purposes of the record, as though a separate motion had been made by each of said defendants and repeated as to each of the counts in the information and that the court rule accordingly.

The Court: The Motion is so considered, and the Court rules, on each motion, that the same is overruled.

Mr. Keefe: May we have exceptions to each ruling of the court.

The Court: You may; exceptions allowed as to the ruling of each of said motions.

Mr. Keefe: We do not care to present any evidence.

CHARGE TO JURY

Whereupon the court gave the following charge to the jury:

Gentlemen of the jury, the information in this case is in nine counts; all charging violation of the National Prohibition Act. The first four counts charge sale of liquor by all of the defendants, being three in number; Henry Albrecht, Senior, Henry Albrecht, Junior, and Thomas Maher, sales by those defendants of intoxicating liquor, that is liquor containing more than one-half of one percent of alcohol by volume, fit for beverage purposes, contrary to the provisions of the Act of Congress. The second four counts, the 5th, 6th, 7th and 8th counts, charge that the same defendants illegally possessed the same kind of intoxicating liquor, contrary to the provisions of the Act of Congress, and the 9th count charges that the defendants unlawfully maintained a nuisance; that is, a place or room where such intoxicating liquor was kept for the purpose of unlawful sale and barter and where it was from time to time unlawfully sold and bartered.

All of these counts charge that these alleged violations occurred in the month of February, 1924, the sales being alleged to have been made on the 16th, 19th, 20th and 27th, the charges of illegal possession being averred to have been committed at the same times, and the nuisance being alleged to have been maintained at the same times.

Under the law if, at a place of business of this character, people have intoxicating liquor, liquor that contains more than one-half of one per cent of alcohol by volume, fit for beverage purposes, unless they have a government permit for some regular business that is recognized by the law for the purpose of distribution of liquor, the mere possession is a violation of the law and the selling of the liquor at such a place is a further violation. And the keeping of the liquor at such a place for the purpose of barter, or trade, or sale and the repeated selling of it at the same place amounts in law to the keeping of a common nuisance. Of course, the liquor must be intoxicating, it must be liquor that is fit for beverage purposes and contain more than one-half of one per cent of alcohol by volume, before there can be any violation of the law.

Now you have heard the evidence submitted here. The government [fol. 111] ment has submitted its case, and the defendants have seen fit to rest the case upon the evidence submitted by the government, as they have a right to do, and it is for you to determine whether or not these men are guilty as charged in this information.

The evidence of the government in substance is that on the different dates, on the 16th, 19th, 20th and 27th, the various witnesses whom you have seen here on the witness stand, some on one date, some on another date, some on another date and some on still another date, went to this place of business and there bought intoxicating liquor which they say was fit for beverage purposes and which they say contained more than one-half of one per cent of alcohol by volume. They say that they purchased certain drinks of liquor, and in addition that they purchased certain bottles containing liquor, and the government chemist tells you that said liquor contains, in so far as these bottles are concerned, about 45% of alcohol by volume and is fit for beverage purposes. They tell you, I think, that these purchases were made of the defendant Maher, whom they describe as the bartender. The place where these purchases were made has been mentioned in evidence as the place of H. Albrecht or of H. Albrecht & Co.

[fol. 112] The question here is, of course, as to the guilt of each and all of these defendants. There is no direct evidence of a direct sale by either Henry Albrecht, Senior, or Henry Albrecht, Junior, as I recall the evidence; if I am in error you will remember the facts. The law upon that subject is this, gentlemen; if under the facts and circumstances in evidence you believe that they were concerned in, that they were participating in, the sales or in the possession of liquor at this particular place; if they had a business interest in it; if they had a common concern in it; if they were co-operating with defendant Maher; if the defendant Maher was their employe and sold such liquor and if they knowingly saw him sell such liquor in their place, or if it was their place and if they knowingly authorized him to sell and he did sell, or if they, acting in conjunction with him, participated in the sale of liquor or in the possession of liquor, then the guilt, if there is guilt, would be as much theirs as his, and the mere fact that one of several who are concerned in a joint enterprise makes a sale does not relieve the others if they are jointly interested with him. That is a question, of course, for you to determine from the evidence. Now you have heard the evidence which has been submitted, you are the judges of the facts and it is for you to determine whether all these defendants [fol. 113] are guilty in manner and form as charged in the information or whether they or some of them are not guilty.

If you believe from the evidence that the defendant, Maher, did from time to time as charged in the information sell intoxicating liquor at the times and places mentioned and that at said times he had possession of intoxicating liquor somewhere on those premises and if you believe further that the defendants Albrecht, father and son, were acting in conjunction with him, or that he was acting as their employe; or that they were participating in such illegal

sale or in such illegal possession, then, of course, all of the defendants would be guilty upon all of these counts, because such facts would amount to a violation of the law upon each of the charges that are set forth in this information.

The rule of law, of course, is that the defendants must be proven guilty beyond all reasonable doubt; that means that you must consider all of the facts and circumstances, all of the exhibits and from them determine whether or not there is any reasonable doubt in your mind as to the guilt of any or all of the defendants.

A reasonable doubt is a substantial doubt based upon all of the testimony, upon all of the evidence; it is such a doubt as would cause you to pause or hesitate in your ordinary business transactions. [fol. 114] Proof beyond a reasonable doubt means proof to a moral certainty. If you are morally certain of a fact, then it is proven beyond all reasonable doubt.

You are the judges of the credibility of the witnesses who have testified before you. You have a right to take into consideration their interest or lack of interest in the outcome of this lawsuit, their manner upon the witness stand, the reasonableness or unreasonableness of their testimony, their apparent candor or lack of candor, their apparent truthfulness or lack of truthfulness, and from all these determine in your mind what credit shall be given to the testimony.

I don't know that there are any other subjects that I need to charge you upon. If you believe these defendants are guilty, then you will return a verdict finding them guilty. If you have a reasonable doubt about it in your mind, then you will acquit them all or such of them as you may have a reasonable doubt about. You have a right to find them guilty upon certain of the counts and not guilty upon others, and you have a right to find one of them, two of them, or three of them guilty, or you have a right to find them all not guilty.

The Court: Are there any exceptions or suggestions, gentlemen? [fol. 115] Mr. Allen: None.

Mr. Karch: None.

The Court. You will retire with the officer, consider your verdict and when you have arrived at a verdict, return it into open court.

VERDICT—Omitted; printed side page 36 ante

IN UNITED STATES DISTRICT COURT
ORDER SETTLING BILL OF EXCEPTIONS

The above and the foregoing is a true and correct transcript of all matters and proceedings, not apparent upon the record, had in the cause hereinabove entitled containing therein all objections to such proceedings, the action of the court relative thereto, and the exceptions thereto taken and allowed; of all objections made to the

[fol. 116] introduction of evidence, of all rulings of the court therein, exceptions taken thereto and allowed, and of all of the testimony heard on the trial of this cause; and a true and correct transcript of the courts charge to the jury.

Walter C. Lindley, Judge.

And now in furtherance of justice and that the right may be done, the defendants, Henry Albrecht, Senior, Henry Albrecht, Junior, and Thomas Maher, tender and present their bill of exceptions in this case to the action of the court, and pray that the same may be settled and allowed and signed and sealed by the court and made a part of the record, and the same is accordingly done this, the 29th day of May, A. D. 1924.

Walter C. Lindley, Judge.

O. K. D. E. Keefe, S. W. Baxter, Charles A. Karch, and Harold G. Baker, Atty's for Plaintiff in Error.

O. K. W. O. Potter, U. S. Atty.

[fol. 117] IN UNITED STATES DISTRICT COURT

WRIT OF ERROR—Filed May 2, 1924

The President of the United States to the Honorable the Judges of the District Court of the United States for the Eastern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you between the United States of America, Plaintiff and Henry Albrecht, Senior, and Henry Albrecht, Junior and Thomas Maher, a manifest error hath happened to the great damage of the said Henry Albrecht, Senior, Henry Albrecht, Junior and Thomas Maher, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court of the United States, at Washington, District of Columbia, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the second day of May, in the year of our Lord one thousand nine hundred and twenty-four.

Marshall E. Daniel, Clerk of the District Court of the United States for the Eastern District of Illinois. (Seal of the District Court of the United States, Eastern District of Illinois.)

Allowed by Walter C. Lindley, Judge.

EASTERN DISTRICT OF ILLINOIS, ss:

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 29th day of May, A. D. 1924.

Marshall E. Daniel, Clerk United States District Court, Eastern District of Illinois.

[File endorsement omitted.]

[fols. 118 & 119] CITATION—In usual form, showing service on W. O. Potter; omitted in printing

[fol. 120] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRECIPUE FOR TRANSCRIPT OF RECORD

To the Clerk of the United States District Court for the Eastern District of Illinois:

You are hereby respectfully directed to prepare and certify a transcript of the record in the above entitled cause for the use of the Supreme Court of the United States, by including therein the following:

1. Placita.
2. Order of Court granting leave to file the information and ordering warrant to issue thereon.
3. The information and affidavits thereto attached in support thereof as originally filed.
4. The affidavits originally filed with the information, as re-sworn and re-attested before the Clerk of the District Court on the 31st day of March A. D. 1924.
5. The affidavits of Otto Turley, O. Jones, J. A. Miller and David P. Coggins dated and filed March 31st, 1924.
6. The warrant for arrest of defendants issued on the original information and returned therein.

[fol. 121] 7. Defendants' motion to quash filed on the 28th day of March A. D. 1924.

8. Defendants' amended Motion to quash filed on the 31st day of March A. D. 1924, and the order of the court overruling same, with exceptions allowed.

9. Demurrer and order overruling same, and exceptions allowed thereto.

10. Order of Court granting Motion to nolle as to original defendants Louis Oldenburg and Frank Ellis.

11. Plea of not guilty.

12. Proceedings of the trial.

13. Verdict.

14. Motion in arrest of judgment and order of court overruling same and exceptions to such ruling of the court.

15. Judgment and sentence of the court.

16. Petition for Writ of Error and Assignment of Errors.

17. Order allowing Writ of Error, supersedeas and bail.

18. The bonds of defendants for security, etc., and order approving same.

19. The bonds of defendants for appearance and order approving same.

20. Bill of Exceptions.

21. Writ of Error.

22. Citation.

23. Præcipe for transcript of the record and proof of service thereof on opposite party.

24. Clerk Certificate.

Dated this 8th day of May, A. D. 1924.

D. E. Keefe, Samuel W. Baxter, Harold G. Baker, Charles A. Karch.

[fol. 122] IN UNITED STATES DISTRICT COURT.

[Title omitted]

NOTICE OF PRÆCIPE

Attorney for Defendant-in-Error

Please take notice that on the 8th day of May, A. D. 1924, the undersigned filed with the Clerk of this Court a præcipe for the Record to be transmitted to the Supreme Court of the United States, on writ of error sued out in the above entitled cause, a copy of which præcipe is herewith served on you, dated this 8th day of May A. D. 1924.

D. E. Keefe, S. W. Baxter, H. F. Baker, & C. A. Karch, Attorneys for Plaintiff-in-error.

Service of the within notice and copy of the præcipe is hereby accepted this 8th day of May A. D. 1924.

W. O. Potter, United States Attorney for the Eastern District of Illinois, Attorney for Defendant-in-error, by L. O. Walcott, Assistant United States Attorney for the Eastern District of Illinois.

[fol. 123]

IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Marshall E. Daniel, Clerk of the District Court of the United States for the Eastern District of Illinois, and keeper of the records and seals thereof, do hereby certify the foregoing to be a true and correct transcript of the trials and records in said court and made in accordance with the præcipe filed in the Cause entitled the United States of America vs. Henry Albrecht, Senior, Henry Albrecht, Junior, and Thomas Maher, Number 373-D, as fully as the same appears from the originals now on file and of record in my office. And I further certify that the Citation with the endorsements thereon is the original Citation with the endorsements in said Cause.

In testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of East St. Louis, in the Distret aforesaid, this 29th day of May, A. D. 1924.

Marshall E. Daniel, Clerk. (Seal of the District Court of the United States, Eastern District of Illinois.)

Endorsed on cover: File No. 30,404. E. Illinois D. C. U. S. Term No. 439. Henry Albrecht, Senior; Henry Albrecht, Junior, and Thomas Maher, plaintiffs in error, vs. The United States of America. Filed June 10, 1924. File No. 30,404.

5
Stipulation and Addition to Record

Supreme Court of the United States

OCTOBER TERM, 1920

No. 9

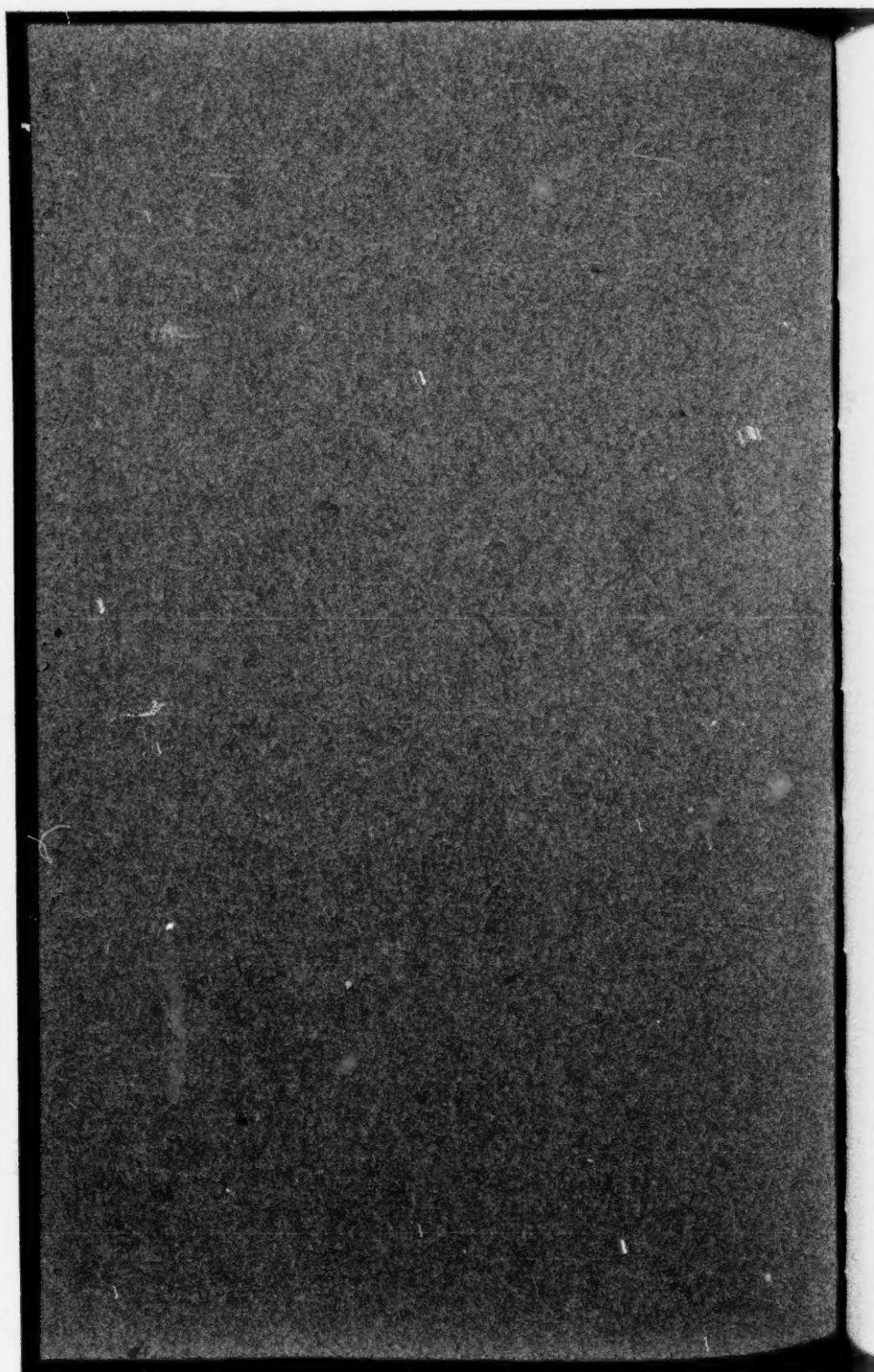
**HENRY ALBRECHT, SR., HENRY ALBRECHT, JR.,
AND THOMAS MAHER, PLAINTIFFS IN ERROR,**

THE UNITED STATES OF AMERICA,

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF ILLINOIS**

WRIT OF HABEAS CORPUS

(20, 224)



(30,404)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 9

HENRY ALBRECHT, SR., HENRY ALBRECHT, JR.,
AND THOMAS MAHER, PLAINTIFFS IN ERROR,

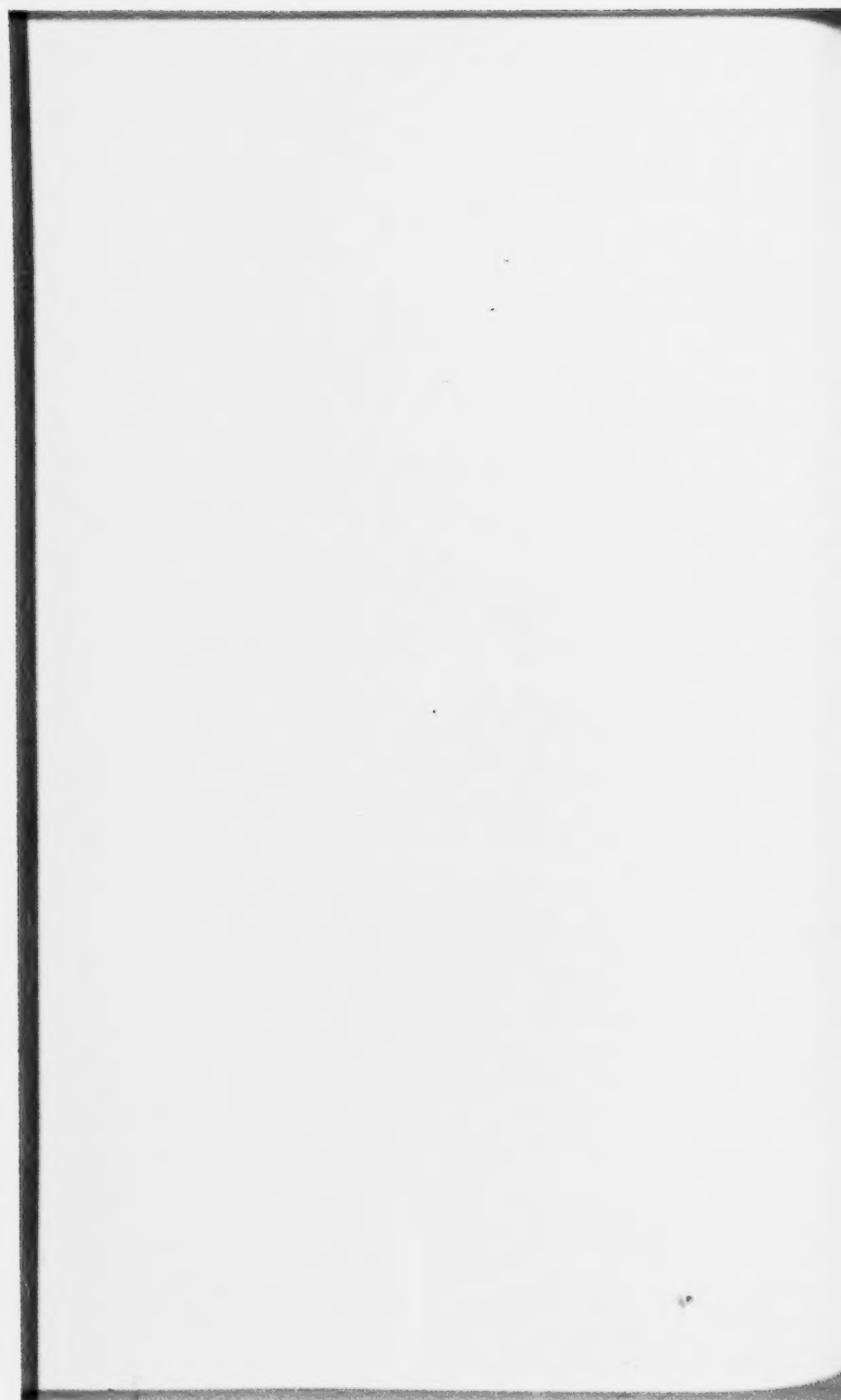
vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF ILLINOIS

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[fols. a & 1 & 2]

**IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1926**

No. 9

HENRY ALBRECHT, SR., HENRY ALBRECHT, JR., and THOMAS
MAHER, Plaintiffs in Error,

v.

THE UNITED STATES OF AMERICA

In Error to the District Court of the United States for the
Eastern District of Illinois

STIPULATION RE ADDITION TO RECORD

In order to avoid the formality of the issuance of a writ of certiorari for diminution of the record, it is hereby stipulated and agreed by and between the above-named parties and their respective counsel that the attached supplemental return certified by the Clerk of the District Court of the United States for the Eastern District of Illinois, which contains a record of certain proceedings had in that court in the above-entitled cause, may be forthwith filed with the Clerk of the Supreme Court of the United States, to become a part of the record in said cause with the same force and effect as if returned and filed in response to a writ of certiorari for diminution of the record.

Charles A. Houts, Attorney for Plaintiffs in Error.
William D. Mitchell, Solicitor General.

November 12, 1926.

[fols. 3 & 4] IN UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF ILLINOIS

Present: Honorable Walter C. Lindley, Judge.

No. 373-D

UNITED STATES

vs.

HENRY ALBRECHT, alias HENRY ALBRECHT, SENIOR; HENRY
Albrecht, alias Henry Albrecht, Junior; Louis H. Olden-
burg, Frank Ellis, and Thomas Maher

ORDER FOR WARRANT—March 26, 1924

Now on this 26th day of March, A. D. 1924, comes W. O. Potter, United States Attorney for the Eastern District of Illinois, and on his motion, it is ordered by the Court, that a Bench Warrant issue for the arrest of the defendants herein, directed to the Marshal of this District to execute, returnable forthwith at East St. Louis, in said District.

[fols. 5 & 6] IN UNITED STATES DISTRICT COURT

WARRANT AND MARSHAL'S RETURN—Filed May 2, 1924

The United States of America to the Marshal of the Eastern District of Illinois, Greeting:

We command you, that you take Henry Albrecht, alias Henry Albrecht, Senior; Henry Albrecht, alias Henry Albrecht, Junior; Louis H. Oldenburg; Frank Ellis and Thomas Maher, if they be found in your district, and them safely keep, so that you have their bodies before our Judge of our District Court of the United States for the Eastern District of Illinois, at the term thereof now being holden at Danville, in the District aforesaid, forthwith, to answer unto the United States of America in an Information for Violation of the National Prohibition Act and have you then and there this writ.

Witness, the Hon. Walter C. Lindley, Judge of our said Court, at Danville, in the District aforesaid, this 26th day of March, A. D. 1924.

(Signed) Marshall E. Daniel, Clerk. (Seal U. S. Dist. Court.)

UNITED STATES OF AMERICA,
Eastern District of Illinois, ss:

I have executed the within writ by arresting the within-named defendant Henry Albrecht, Senior, Henry Albrecht, Junior, Louis H. Oldenburg, Frank Ellis and Thomas Maher at East St. Louis on the 27th day of March, 1924, and now have his body in Court as I am within commanded, this 27th day of March, 1924.

James A. White, U. S. Marshal, by R. O. Shepherd, Deputy.

Marshal's Fees, \$10.06.

[File endorsement omitted.]

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

BOND FOR APPEARANCE—Filed March 26, 1924

We, Henry Albrecht, Jr., East St. Louis, Ill. as Principal, and Fred Lehman, 75th & State St., East St. Louis, Illinois, as Surety, do hereby acknowledge ourselves to owe and be indebted to the United States of America in the penal sum of Two Thousand Dollars, each, lawful money of the United States, to be levied of our respective goods and chattels, lands and tenements, if default be made on the following conditions:

The conditions of this obligation are such that if the said defendant, Henry Albrecht, Jr., as Principal, shall personally be and appear before this Court from day to day of this term, and from term to term, and from day to day of each term hereafter, wherever held, until this cause is finally disposed of, to answer and stand trial upon the In-

formation herein, and to stand by and abide the orders or judgment of the Court in the premises, and not depart the Court without leave thereof, then this obligation to be null and void; otherwise to remain and be in full force and effect.

Henry Albrecht, Jr. (Seal.) Fred Lehman. (Seal.)

Taken and acknowledged before me this 26 day of March, A. D. 1924.

Marshall E. Daniel, Clerk, by Pearl V. Bowling,
Deputy Clerk. (Seal U. S. Dist. Court.)

UNITED STATES OF AMERICA,

Eastern District of Illinois, ss:

Fred Lehman, of 75th and State St., East St. Louis, Illinois, who offers himself as surety on the recognizance of Henry Albrecht, Jr., defendant in Case No. 373-D, first being duly sworn, deposes and says that he owns real estate, in fee simple, situated within the Eastern District of Illinois, to the value of eight thousand dollars, over and above all mortgages, liens, judgments, or exemptions, and more particularly described as follows: Lot 100 ft. x 150 ft. located at the N. E. Corner of 33rd St. and Bond Ave., East St. Louis, St. Clair County, Illinois; that the title to said real estate is in his own name and of record in St. Clair County, Illinois.

Fred Lehman.

Subscribed and sworn to before me this 26 day of March, A. D. 1924. Marshall E. Daniel, Clerk, by Pearl V. Bowling, Deputy Clerk. (Seal U. S. Dist. Court.)

[File endorsement omitted.]

[fols. 8 & 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

BOND FOR APPEARANCE—Filed March 26, 1924

We, Henry Albrecht, Sr., E. St. Louis, Ill., as principal, and Fred Lehman, 75th and State St., East St. Louis, Ills., as Surety, do hereby acknowledge ourselves to owe and be

indebted to the United States of America in the penal sum of two thousand dollars, each, lawful money of the United States, to be levied of our respective goods and chattels, lands and tenements, if default be made on the following conditions:

The conditions of this obligation are such that if the said defendant, Henry Albrecht, Sr., as Principal, shall personally be and appear before this Court from day to day of this term, and from term to term, and from day to day of each term hereafter, wherever held, until this cause is finally disposed of, to answer and stand trial upon the information herein, and to stand by and abide the orders or judgment of the Court in the premises, and not depart the Court without leave thereof, then this obligation to be null and void; otherwise to remain and be in full force and effect.

H. Albrecht. (Seal.) Fred Lehman. (Seal.)

Taken and acknowledged before me this 26 day of March, A. D. 1924. Marshall E. Daniel, Clerk, by Pearl V. Bowling, Deputy Clerk. (Seal U. S. Dist. Court.)

UNITED STATES OF AMERICA,
Eastern District of Illinois, ss:

Fred Lehman, of 75 & State Sts., East St. Louis, Ill., who offers himself as surety on the recognizance of Henry Albrecht, Sr., defendant in Case No. 373-D, first being duly sworn, deposes and says that he owns real estate, in fee simple, situated within the Eastern District of Illinois, to the value of four thousand dollars, over and above all mortgages, liens, judgments, or exemptions, and more particularly described as follows: Lot 100 ft. x 150 ft. located at the N. E. Corner of 33rd St. and Bond Ave., East St. Louis, St. Clair County, Illinois; that the title to said real estate is in his own name and of record in St. Clair County, Illinois.

Fred Lehman.

Subscribed and sworn to before me this 26 day of March, A. D. 1924. Marshall E. Daniel, Clerk, by Pearl V. Bowling, Deputy Clerk. (Seal U. S. Dist. Court.)

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

BOND FOR APPEARANCE—Filed March 27, 1924

We, Thomas Maher, 328 E. Broadway, E. St. L., Ill., as Principal, and George G. Keith, 1416 St. Louis Ave., East St. Louis, Illinois, as Surety, do hereby acknowledge ourselves to owe and be indebted to the United States of America in the penal sum of two thousand dollars, each, lawful money of the United States, to be levied of our respective goods and chattels, lands and tenements, if default be made on the following conditions:

The conditions of this obligation are such that if the said defendant, Thomas Maher, as Principal, shall personally be and appear before this Court from day to day of this term and from term to term, and from day to day of each term hereafter, wherever held, until this cause is finally disposed of, to answer and stand trial upon the Information herein, and to stand by and abide the orders or judgment of the Court in the premises, and not depart the Court without leave thereof, then this obligation to be null and void; otherwise to remain and be in full force and effect.

Thomas Maher. (Seal.) George G. Keith. (Seal.)

Taken and acknowledged before me this 27 day of March, A. D. 1924. Marshall E. Daniel, Clerk, by Pearl V. Bowling, Deputy Clerk. (Seal U. S. Dist. Court.)

UNITED STATES OF AMERICA,
Eastern District of Illinois, ss:

George G. Keith, of 1416 St. Louis Ave., East St. Louis, Illinois, who offers himself as surety on the recognizance of Thomas Maher, defendant in Case No. 373-D, first being duly sworn, deposes and says that he owns real estate, in fee simple, situated within the Eastern District of Illinois, to the value of twenty thousand dollars, over and above all mortgages, liens, judgments, or exemptions, and more particularly described as follows: Lot 27, Common fields of Cahokia, Hilgards Plat, containing 12.134 Acres, situated

in St. Clair County, Illinois; that the title to said real estate is in his own name and of record in St. Clair County, Illinois.

George B. Keith.

Subscribed and sworn to before me this 27 day of March, A. D. 1924. Marshall E. Daniel, Clerk, by Pearl V. Bowling, Deputy Clerk. (Seal U. S. Dist. Court.)

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

BOND FOR APPEARANCE—Filed March 27, 1924

We, Frank Ellis, 328 E. Broadway, E. St. L., Ill., as Principal, and George G. Keith, 1416 St. Louis Ave., East St. Louis, Illinois, as Surety, do hereby acknowledge ourselves to owe and be indebted to the United States of America in the penal sum of two thousand dollars, each, lawful money of the United States, to be levied of our respective goods and chattels, lands and tenements, if default be made on the following conditions:

The conditions of this obligation are such that if the said defendant, Frank Ellis, as Principal, shall personally be and appear before this Court from day to day of this term, and from term to term, and from day to day of each term hereafter, wherever held, until this cause is finally disposed of, to answer and stand trial upon the Information herein, and to stand by and abide the orders or judgment of the Court in the premises and not depart the Court without leave thereof, then this obligation to be null and void; otherwise to remain and be in full force and effect.

Frank H. Ellis. (Seal.) George G. Keith. (Seal.)

Taken and acknowledged before me this 27 day of March, A. D. 1924. Mrshall E. Daniel, Clerk, by Pearl V. Bowling, Deputy Clerk. (Seal U. S. Dist. Court.)

UNITED STATES OF AMERICA,
Eastern District of Illinois, ss:

George G. Keith, of 1416 St. Louis Ave., East St. Louis, Ill., who offers himself as surety on the recognizance of Frank Ellis, defendant in Case No. 373-D, first being duly sworn deposes and says that he owns real estate, in fee simple, situated within the Eastern District of Illinois, to the value of twenty thousand dollars, over and above all mortgages, liens, judgments, or exemptions, and more particularly described as follows: Lot 27, Commonfields of Cahokia, Hilgards Plat, containing 12.134 acres, situated in St. Clair, Illinois, worth \$20,000.00; that the title to said real estate is in his own name and of record in St. Clair County, Illinois.

George G. Keith.

Subscribed and sworn to before me this 27 day of March, A. D. 1924. Marshall E. Daniel, Clerk, by Pearl V. Bowling, Deputy Clerk. (Seal U. S. Dist. Court.)

[File endorsement omitted.]

[fols. 12 & 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

BOND FOR APPEARANCE—Filed March 27, 1924

We, Louis H. Oldenburg, 409 State St., East St. Louis, Ill., as Principal, and Wm. J. Veach, 619 N. 10th St., East St. Louis, Illinois, as surety, do hereby acknowledge ourselves to owe and be indebted to the United States of America in the penal sum of two thousand dollars, each, lawful money of the United States, to be levied of our respective goods and chattels, lands and tenements, if default be made on the following conditions:

The conditions of this obligation are such that if the said defendant, Louis Oldenburg, as Principal, shall personally be and appear before this Court from day to day of this term, and from term to term, and from day to day of each

term hereafter, wherever held, until this cause is finally disposed of, to answer and stand trial upon the Information herein, and to stand by and abide the orders or judgment of the Court in the premises, and not depart the Court without leave thereof, then this obligation to be null and void; otherwise to remain and be in full force and effect.

Louis H. Oldenburg. (Seal.) Wm. J. Veach. (Seal.)

Taken and acknowledged before me this 27th day of March, A. D. 1924.

Marshall E. Daniel, Clerk, by Pearl V. Bowling, Deputy Clerk. (Seal U. S. Dist. Court.)

UNITED STATES OF AMERICA,

Eastern District of Illinois, ss:

Wm. J. Veach, of 619 N. 10th St., East St. Louis, Ill., who offers himself as surety on the recognizance of Louis H. Oldenburg, defendant in Case No. 373-D, first being duly sworn, deposes and says that he owns real estate, in fee simple, situated within the Eastern District of Illinois, to the value of eighty-five hundred dollars, over and above all mortgages, liens, judgments, or exemptions, and more particularly described as follows: S. E. 15' Lot 4 and all of lots 5 to 21, both inclusive, Block 90, Denverside Subdivision, East St. Louis, Illinois; that the title to said real estate is in his and A. G. Schluter name- and of record in St. Clair County Illinois.

Wm. J. Veach.

Subscribed and sworn to before me this 27th day of March, A. D. 1924. Marshall E. Daniel, Clerk, by Pearl V. Bowling, Deputy Clerk. (Seal U. S. Dist. Court.)

[File endorsement omitted.]

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO QUASH INFORMATION, APPEARANCE LIMITED—
Filed March 28, 1924

Now comes Henry Albrecht, alias Henry Albrecht, Senior, (Sr.), Henry Albrecht, alias Henry Albrecht, Junior, (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, defendants in the above entitled cause, by D. E. Keefe, S. W. Baxter and C. A. Karch, their attorneys, and specially limit their appearance in this cause for the purpose of interposing the following motion, hereby protesting that this Court has no jurisdiction of the persons or either of them, and of the subject matter of this cause; and in that behalf move to quash the information and each count thereof filed in this cause and say:

I. That there are no sufficient facts pleaded or set forth in said information or either count thereof to charge these defendants or either of them with the commission of any crime or the violation of any law of the United States.

II. Because said information and each count thereof has not been presented to the Court properly verified in this, that it is not verified by the United States Attorney for the Eastern District of Illinois, nor is there any proper or sufficient affidavit attached to or made any part of said information to show probable cause as required by law.

III. Because the affidavits attached to and made in support of the said information and the several counts thereof, are not sufficient to charge the defendants jointly nor to [fol. 15] support the charge in said information or any count thereof of any joint action, or the commission of any criminal offense by joint action on the part of the defendants of any law of the United States.

IV. Because the affidavits attached to said information and upon which affidavits the said information and each count thereof has been presented to the Court and a warrant issued thereon are not sufficient to authorize the

issuance of any warrant against the defendants or either of them as has been done in this cause.

V. Because the affidavits thereto attached fail to show probable cause for the prosecution of the defendants for a violation of any law of the United States and are insufficient to support the information or any count thereof.

VI. Because the verification and authentication of each affidavit is insufficient to support the information and each count thereof.

VII. Because the affidavits thereto attached and each of them are not such and are insufficient to subject the affiants therein or either or any of them to the pains and penalties of perjury if the matters therein set forth and alleged are false.

D. E. Keefe, S. W. Baxter, Charles A. Karch, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Eastern District of Illinois, ss:

I, Marshall E. Daniel, Clerk of the District Court of the United States for the Eastern District of Illinois, and keeper of the records and seals thereof, do hereby certify the foregoing to be a true copy of all proceedings from the date of the filing of the information on the 26th day of March A. D. 1924 to the date of the trial on the 31st day of March A. D. 1924, in the case of the United States vs. Henry Albrecht, alias Henry Albrecht, Senior, Henry Albrecht, alias Henry Albrecht, Junior, Louis H. Oldenburg, Frank Ellis and Thomas Maher, No. 373-D as fully as the same appears from the records in my office.

In testimony whereof I have hereunto set my hand and

affixed the seal of said Court, at my office in the City of East St. Louis, in the District aforesaid, this 12th day of November, A. D. 1926.

Marshall E. Daniel, Clerk. (Seal of the District Court United States, Eastern District, Illinois.)

Endorsed on cover: File No. 30,404. E. Illinois, D. C. U. S. Term No. 9. Henry Albrecht, Sr., Henry Albrecht, Jr., and Thomas Maher, palintiffs in error, vs. The United States of America. Stipulation and addition to the record. Filed November 15th, 1926. File No. 30,404.

(3612)

(6)

OCT 21 1925

WM. R. STANSBURY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 439. 9

HENRY ALBRECHT, SENIOR; HENRY ALBRECHT, JUNIOR,
and THOMAS MAHER, Plaintiffs in Error,

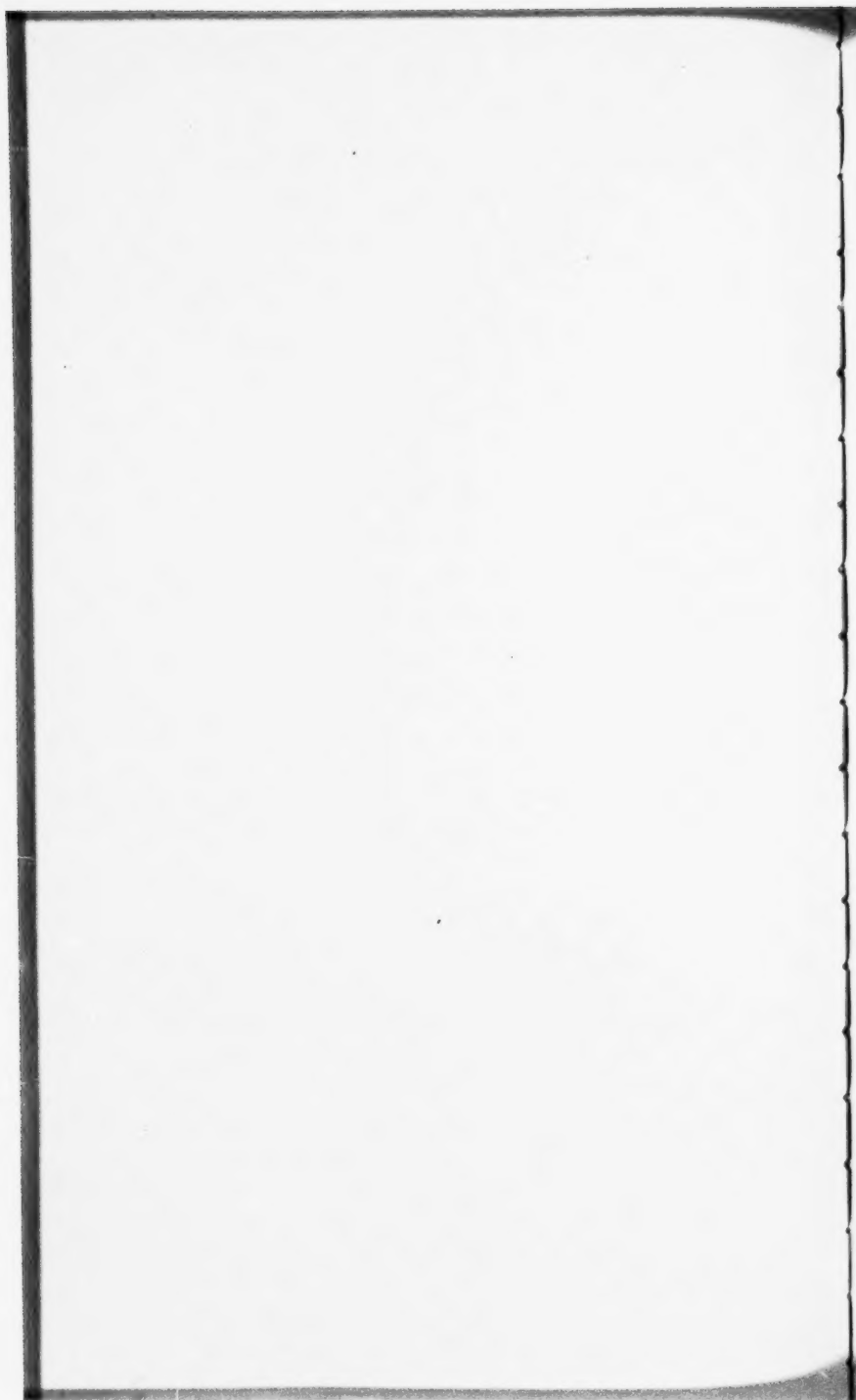
vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

In Error to the District Court of the United States for the
Eastern District of Illinois.

**STATEMENT OF THE CASE, ERRORS RELIED
UPON AND BRIEF OF THE ARGUMENT IN
BEHALF OF THE PLAINTIFFS IN ERROR.**

SAMUEL W. BAXTER,
D. E. KEEFE,
Attorneys for Plaintiffs in Error.



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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 439.

HENRY ALBRECHT, SENIOR; HENRY ALBRECHT, JUNIOR,
and THOMAS MAHER, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

In Error to the District Court of the United States for the
Eastern District of Illinois.

**STATEMENT OF THE CASE, ERRORS RELIED
UPON AND BRIEF OF THE ARGUMENT IN
BEHALF OF THE PLAINTIFFS IN ERROR.**

STATEMENT.

MAY IT PLEASE THE COURT:

THE PROCEDURE.

This case is brought to this court on writ of error to
the District Court of the United States, for the Eastern

District of Illinois, in which court an information was filed by the United States District Attorney for that court, on an order made by the court permitting such information to be filed, and resulting in a trial by jury finding plaintiffs in error guilty of a violation of the National Prohibition Act, and a judgment rendered whereby plaintiffs in error, Henry Albrecht, Sr. and Henry Albrecht, Jr., were sentenced to be imprisoned in the Vermilion County, Illinois, jail for a period of six months on each of the first, second and third counts of the information; that they each pay a fine to the United States in the sum of five hundred (\$500.00) dollars, on each of the fourth, fifth, sixth, seventh and eighth counts; and that they each be imprisoned in the Vermilion County, Illinois, jail for a period of one year and to pay a fine to the United States in the sum of one thousand (\$1,000.00) dollars, together with costs of the prosecution, on the ninth count of the information.

And plaintiff in error, Thomas Maher, was sentenced to be imprisoned in the Vermilion County jail, for a period of six months, on the first, second, third and fourth counts of the information, and that he pay a fine of five hundred (\$500.00) dollars on each of the fifth, sixth, seventh and eighth counts, and that he be imprisoned in the said jail, for a period of six months, on the ninth count of the information (R. 14-15).

The judgment and sentence aforesaid further directs execution to issue for the fines and the defendants to be

committed to jail until the amount of the fines and costs have been paid; that the imprisonment sentences run and be served concurrently (R. 14-15).

The information was filed on the 26th day of March, A. D. 1924, pursuant to an order of the District Court upon the application of the United States Attorney and the order is as follows (R. 1):

“Now comes W. O. Potter, United States Attorney in and for the Eastern District of Illinois, and presents to the Court an information against Henry Albrecht, alias Henry Albrecht Senior (Sr.), Henry Albrecht, alias Henry Albrecht Junior (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, charging said defendants with violation of the National Prohibition Act, and the Court having examined said information now orders that the same be filed, and that process issue for the said Henry Albrecht, alias Henry Albrecht, Senior (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher.

“It is further ordered that bail be fixed at two thousand dollars (\$2,000.00).

Walter C. Lindley, Judge.”

And on the same date last aforesaid, the Court upon the application of the United States Attorney, entered the following order (R. 8):

“And now on this 26th day of March, A. D. 1924, comes W. O. Potter, United States Attorney for the

Eastern District of Illinois, and upon his motion it is ordered by the Court that a bench warrant issue for the arrest of the defendants herein, directed to the Marshal of this district to execute, returnable forthwith at Danville, in said district.”

Upon such order being made, a warrant for the arrest and detention of the defendants issued and was executed as shown by the return on the warrant. The warrant which was issued and returned is as follows (R. 18, 19):

“We command you, that you take Henry Albrecht, alias Henry Albrecht, Senior, Henry Albrecht, alias Henry Albrecht, Junior, Louis H. Oldenburg, Frank Ellis and Thomas Maher, if they be found in your district, and them safely keep, so that you have their bodies before our Judge of our District Court of the United States for the Eastern District of Illinois, at the term thereof now being holden at Danville, in the district aforesaid, forthwith, to answer unto the United States of America in an information for Violation of the National Prohibition Act, and have you then and there this writ.

“Witness the Honorable Walter C. Lindley, Judge of our said court, at Danville, in the district aforesaid, this 26th day of March, A. D. 1924, Marshall E. Daniel, Clerk.

(Seal U. S. Dist. Court)”

and the return made thereon is as follows (R. 19):

“United States of America

Eastern District of Illinois, ss:

I have executed the within writ by arresting the within-named defendants, Henry Albrecht, 'Senior, Henry Albrecht, Junior, Louis H. Oldenburg, Frank Ellis and Thomas Maher at East St. Louis, on the 27th day of March, 1924, and now have his body in court as I am within commanded this 27th day of March, 1924.

James A. White, U. S. Marshal.

By R. O. Shepherd, Deputy.”

The information contained nine counts, the first, second, third and fourth charged the plaintiffs in error with unlawfully selling intoxicating liquor, and the first count is as follows (R. 1):

“W. O. Potter, United States Attorney in and for the Eastern District of Illinois, who prosecutes on behalf of the United States, in his own proper person comes into court this 26th day of March, A. D. 1924, and by leave of the Court, first had and obtained, gives the Court to understand and be informed on the affidavit of J. A. Miller and D. P. Coggins, that Henry Albrecht, alias Henry Albrecht, Senior (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, on to wit, the 19th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St.

Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully sell a large quantity of intoxicating liquor, to wit: two drinks of whisky, which said whisky then and there contained more than one-half of one per cent of alcohol by volume, and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The **second count** is identical with the first except it is there charged that the unlawful selling of liquor was on the 20th day of February and the quantity sold was two drinks of whisky and a half pint of whisky (R. 2).

The **third count** is identical with the first except the date charged of the unlawful selling was the 16th day of February; the quantity of liquor sold a half pint of whisky and the persons making the affidavits were Otto Turley and O. Jones (R. 2).

The **fourth** is identical with the others except it is charged that the information is on the affidavit of J. A. Miller, D. P. Coggins, Otto Turley and O. Jones, and that the date of the unlawful selling was the 27th day of February and that the quantity of liquor sold was a half pint (R. 3). These four counts of the information charged the plaintiffs in error with the unlawful selling of liquor in violation of the National Prohibition Act.

The **fifth count** charges the unlawful possession of in-

toxicating liquor by the plaintiffs in error, and that count is as follows (R. 3):

“And W. O. Potter aforesaid, Attorney for the United States as aforesaid, further gives the Court to understand and be informed, on the affidavit of J. A. Miller, and D. P. Coggins, that Henry Albrecht, alias Henry Albrecht Senior (Sr.), Henry Albrecht, alias Henry Albrecht Junior (Jr.), Louis H. Oldenburg, Frank Ellis, and Thomas Maher, on to wit, the 19th day of February, in the year of our Lord one thousand nine hundred and twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully have in their possession a large quantity of intoxicating liquor, to wit one-half pint of whisky which said whisky then and there contained more than one half of one per cent of alcohol by volume, and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.”

The **sixth count** is identical with the fifth, except as to date, where the unlawful possession is charged to be on the 20th day of February (R. 3).

The **seventh** is identical with the fifth and sixth except the date is charged to be on the 16th day of February, and the information presented on the affidavit of Otto Turley and O. Jones (R. 4).

The **eighth** is the same as the fifth and sixth excepting the date charged is on the 27th day of February (R. 4). The first four counts charged an unlawful selling of liquor. The next four counts charged the unlawful possession of liquor. The **ninth count** charged the plaintiffs in error with maintaining a **common nuisance**, which count is as follows (R. 5):

“And W. O. Potter aforesaid, Attorney for the United States as aforesaid, further gives the Court to understand and be informed on the affidavits of J. A. Miller, D. P. Coggins, Otto Turley and O. Jones, that Henry Albrecht, Senior (Sr.), Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, on to wit, the 27th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully maintain a common nuisance in violation of the provisions of the National Prohibition Act, by then and there unlawfully selling, keeping and bartering intoxicating liquor in a certain building located at 328 East Broadway, in the City of East St. Louis, aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.”

The information, as originally filed, purported to have been verified by attaching the joint affidavit of Otto

Turley and O. Jones, and the joint affidavit of J. A. Miller and D. P. Coggins, which affidavits were as follows (R. 6):

“Otto Turley and O. Jones, being first duly sworn, upon their oath depose and say that on February 16th, 1924, at 328 East Broadway, St. Clair County, Illinois, they purchased from H. Albrecht and Company one-half pint of colored spirits, which colored spirits contained more than one-half of one per cent of alcohol by volume and then and there fit for beverage purposes.

“Affiants further say that Henry Albrecht, Sr., was standing near them and in a position so that he could see the colored spirits delivered to them; that Henry Albrecht, Sr., and several men were drinking highballs which Albrecht mixed in front of all spectators, using whisky which he carried from a rear room in whisky glasses.

“And further affiants sayeth not to the contrary.

Otto Turley.

O. Jones.

“Subscribed and sworn to before me this 20th day of February, A. D. 1925.

Earl Gibson.” (Notarial seal.)

(R. 7) “J. A. Miller and D. P. Coggins, being first duly sworn, upon their oath depose and say that on February 19th, 1924, at 5 p. m., they went to Henry Albrecht and Company at 328 East Broadway, East St. Louis, St. Clair County, Illinois, and after purchasing two drinks of whisky, which whisky contained more than one-half of one per cent of alcohol, they asked the bartender for a half pint of whisky

and he replies that they didn't have a sufficient supply on hand to let a half pint go out as they were after some now and would have it later.

"Affiants further state that on February 20th, 1924, at 4 p. m., they went to Albrecht's place of business again, and after purchasing two drinks of whisky they asked for half pint of whisky, which he gave them, charging them \$2.50 for the same.

"Affiants further state that the bartender who waited on them on both occasions was dark complected, about six feet tall, and that on February 20th he sold the whisky in the presence of Mr. Henry Albrecht's oldest son, Henry Albrecht, Jr.

"And further affiants sayeth not to the contrary.

J. A. Miller.

D. P. Coggins.

"Subscribed and sworn to before me this 20th day of February, A. D. 1924.

Earl H. Gibson." (Notarial seal.)

On the 28th day of March, 1924, plaintiffs in error filed a motion to quash the information, urging, in said motion, among other things, that the information was not properly verified by affidavit sufficient in substance to show probable cause; that the authentication of such affidavits as were filed and relied upon to support the information is insufficient (R. 8-9).

On the 31st day of March, A. D. 1924, as the Court was about to hear the said motion to quash, the Government entered its motion to amend the affidavits attached to the information by reswearing the affiants (R. 24), which

motion was allowed and was promptly accomplished by having the affiants depose before the deputy clerk of the district, who added her jurat, of that date (R. 7), to the original affidavits. Plaintiffs in error then requested, and were given leave to amend their motion to quash, and refile same to reach the information and affidavits, as amended, which motion follows, to wit (R. 9):

**Motion to Quash Information and Warrant,
Appearance Limited.**

“Now comes Henry Albrecht, alias Henry Albrecht, Senior (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, defendants in the above-entitled cause, by D. E. Keefe, S. W. Baxter and C. A. Karch, their attorneys, and specially limit their appearance in this cause for the purpose of interposing the following motion, hereby protesting that this Court has no jurisdiction of the persons, or either of them, and of the subject matter of this cause; and in that behalf move to quash the information and each count thereof and the warrant issued on the same filed in this cause and say:

“I. That there are no sufficient facts pleaded or set forth in said information or either count thereof to charge these defendants, or either of them, with the commission of any crime or the violation of any law of the United States.

“II. Because said information and each count thereof has not been presented to the Court properly verified, in this, that it is not verified by the United

States Attorney for the Eastern District of Illinois, nor is there any proper or sufficient affidavit attached to or made any part of said information to show probable cause as required by law.

“III. Because the affidavits attached to and made in support of the said information and the several counts thereof are not sufficient to charge the defendants jointly, nor to support the charge in said information or any count thereof of any joint action, or the commission of any criminal offense by joint action on the part of the defendants of any law of the United States.

“IV. Because the affidavits attached to said information and upon which affidavits the said information and each count thereof has been presented to the Court and a warrant issued thereon are not sufficient to authorize the issuance of any warrant against the defendants, or either of them, as has been done in this cause.

“V. Because the affidavits thereto attached fail to show probable cause for the prosecution of the defendants for a violation of any law of the United States and are insufficient to support the information or any count thereof.

“VI. Because the verification and authentication of each affidavit is insufficient to support the information and each count thereof.

“VII. Because the affidavits thereto attached, and each of them, are not such, and are insufficient, to subject the affiants therein, or either or any of them, to the pains and penalties of perjury if the matters therein set forth and alleged are false.

“VIII. Because the affidavits upon which such in-

formation rests were attached thereto after the said information had been filed.

“IX. Because the original affidavits upon which the information was issued and upon which warrants for arrest were issued were made before a notary public and immediately before the case was called for trial the Government, by leave of Court, amended the said original affidavits by causing the same to be re-executed and again sworn to before the clerk of the court.”

During the hearing on said motion the Government, on the suggestion of the Court, took leave to file additional affidavits to the information (R. 25), and following affidavits filed:

Affidavit of Otto Turley and O. Jones (R. 5).

“Otto Turley and O. Jones, being first duly sworn, upon their oaths depose and say that on, to wit, February 16th, 1924, they went to the place of business of Henry Albrecht and Company, 328 East Broadway, East St. Louis, St. Clair County, Illinois, and there purchased from Thomas Maher, who was the bartender at said place of business, one-half pint of colored spirits or whisky, which said whisky contained more than one-half of one per cent of alcohol by volume, and was fit for beverage purposes.

“Affiants further state that Henry Albrecht, Senior, was standing near them in a position so that he could see the spirits or whisky delivered to them; that Henry Albrecht, Senior, and several men were drinking highballs which said Albrecht mixed in front of

all spectators, using whisky which he carried from a rear room in whisky glasses.

“Affiants further state that Henry Albrecht, Junior, was occupying the cashier’s cage or desk in said place of business and repeatedly went from said desk to places behind the bar therein and cashed a check for affiant Turley, with which cash so received affiant purchased the whisky as herein stated.

Otto Turley and O. Jones.

Subscribed and sworn to before me this 31st day of March, A. D. 1924.

Virginia A. Drone,
Deputy U. S. Clerk, East. Dist. Ill.
(Seal U. S. Dist. Court)”

Affidavit of J. A. Miller and D. P. Coggins (R. 6).

“J. A. Miller and D. P. Coggins, being first duly sworn, upon their oaths depose and say that on, to wit, February 19th, 1924, at about 5 p. m., they went to the place of business of Henry Albrecht and Company, 328 East Broadway, East St. Louis, St. Clair County, Illinois, and there purchased from Thomas Maher, who was there acting as bartender, two drinks of whisky, which whisky contained more than one-half of one per cent of alcohol by volume, and was fit for beverage purposes, for which we paid 50 cents per drink.

“Affiants further state that on February 20, 1924, at 4 p. m., they went to the aforesaid place of business of Henry Albrecht and Company and there purchased two drinks of whisky and one-half pint of whisky, which said whisky contained more than one-

half of one per cent of alcohol by volume, and was fit for beverage purposes; said purchases were made from the aforesaid Thomas Maher; said purchases were made in the presence of Henry Albrecht's son, Henry Albrecht, Junior.

David P. Coggins, J. A. Miller.

Subscribed and sworn to before me this 31st day of March, A. D. 1924.

Virginia A. Drone,
Deputy U. S. Clerk, East. Dist. Ill.
(Seal U. S. Dist. Court)"

Exceptions to the action of the Court allowing the said additional affidavits to be filed were duly saved (R. 25).

The Court, on application of plaintiffs in error, permitted the motion to quash to stand as extended to the information as further amended by the said supplemental affidavits (R. 25), and, after argument on the motion, denied the same; to which ruling of the Court plaintiffs in error duly interposed their exceptions and had the same allowed (R. 26).

At this point in the proceedings the Government entered a nolle prosequi as to defendants Oldenburg and Ellis. Plaintiffs in error next filed their demurrer to the information, as follows:

Demurrer (R. 11).

"And the said Henry Albrecht, alias Henry Albrecht, Senior (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank

Ellis and Thomas Maher, by Charles A. Karch and Samuel W. Baxter, their attorneys, come into court and say that the said information and the matters and things therein set forth, as well as in each count thereof, are not sufficient in law to compel them, the defendants, or either of them, to answer thereto, for that:

“I. That there are no sufficient facts pleaded or set forth in said information or either count thereof to charge these defendants, or either of them, with the commission of any crime or the violation of any law of the United States.

“II. Because said information and each count thereof has not been presented to the Court properly verified, in this, that it is not verified by the United States Attorney for the Eastern District of Illinois, nor is there any proper or sufficient affidavit attached to or made any part of said information to show probable cause as required by law.

“III. Because the affidavits attached to and made in support of the said information and the several counts thereof are not sufficient to charge the defendants jointly, nor to support the charge in said information, or any count thereof of any joint action, or the commission of any criminal offense by joint action on the part of the defendants of any law of the United States.

“IV. Because the affidavits attached to said information and upon which affidavits the said information and each count thereof has been presented to the Court and a warrant issued thereon are not sufficient to authorize the issuance of any warrant against the defendants, or either of them, as has been done in this cause.

“V. Because the affidavits thereto attached fail to show probable cause for the prosecution of the defendants for a violation of any law of the United States and are insufficient to support the information or any count thereof.

“VI. Because the verification and authentication of each affidavit is insufficient to support the information and each count thereof.

“VII. Because the affidavits thereto attached, and each of them, are not such and are insufficient to subject the affiants therein, or either or any of them, to the pains and penalties of perjury if the matters therein set forth and alleged are false.

“VIII. Because the affidavits upon which such information rests were attached thereto after the said information had been filed.

“IX. Because the original affidavits upon which the information was issued and upon which warrants for arrest were issued were made before a notary public, and immediately before the case was called for trial the Government, by leave of Court, amended the said original affidavit by causing the same to be re-executed and again sworn to before the clerk of the court.”

This demurrer having been overruled by the Court, plaintiffs in error excepted (R. 26).

Plaintiffs in error, thereupon, being arraigned, pleaded not guilty to the information, and the trial proceeded, before a jury. At the close of the Government's case, plaintiffs moved for a peremptory instruction, from the Court, to find each of the defendants not guilty, which

motion was denied, and exceptions to that action of the Court granted (R. 41).

THE FACTS.

(R. 26 to 40.)

(R. 27) The facts as shown by the evidence for the Government are, that two investigators, Otto Turley and Ovis Jones, employed by a citizens' law enforcement organization, known as the St. Clair County (Illinois) Cleanup League, to gather evidence against violators of the National Prohibition law, generally, throughout the County of St. Clair, visited, for such purpose, the place of business of Henry Albrecht and Company, at 328 East Broadway, East St. Louis, Illinois. The premises are described as a room 75x30 feet with a "bar" along the left-hand side as you enter; in the fore part on the right, as you enter, is a cigar counter. Further towards the rear of the room, on your right as you enter, about opposite the rear end of the bar, is a cashier's cage; from this cage a partition extends practically across to the left-hand wall, cutting off the portion of the room containing the bar from the rear part of the building, with an entrance near end of the bar of the width of a door, leading from one apartment to another.

(R. 27) When these men entered the premises, Henry Albrecht, Sr., was standing near the back end of the bar with four or five other gentlemen, all of whom were

served by Thomas Maher (a plaintiff in error), the man behind the bar, with a liquid, denominated by Turley, as "colored spirits"; having the same color as the stuff, which he later bought (and drank on the same premises) and called "whisky." The drinks were served by Maher to Henry Albrecht, Sr., and the gentlemen near him, were brought in whisky glasses from the, so-called, rear room, by Maher. They appeared to take these drinks "in a way of a highball," mixed with soda or ginger ale. Turley first approached the cashier's cage and had a check cashed by Henry Albrecht, Jr., who occupied the same. Then Turley and Jones approached the bar, where Henry Albrecht, Sr., was there standing, as aforesaid. Turley requested of Maher, behind the bar to serve him and Jones each a drink of whisky, whereupon Maher went into the back room and brought in two glasses of whisky and served it to Jones and Turley, which they drank, "straight," and stated it was intoxicating liquor, and that it was fit for beverage purposes. Turley paid a dollar (\$1.00) for the two drinks, to Maher, which the latter rung up in the cash register. Having drank the drinks of whisky, Turley offered to buy a half pint of whisky from Maher, who went to the rear room and returned with a half pint of whisky, and delivered it to Turley, for which Turley paid Maher about \$2.50. This bottle of whisky Turley retained for evidence and produced the same at the trial, as an exhibit.

(R. 28) Turley testified that he and Jones made these premises on that occasion expressly for the purpose of securing evidence of the violations of the prohibition laws with a view of ultimately prosecuting a criminal case in court.

Henry Albrecht, Jr., besides being seen in the cage, during the fifteen minutes that Turley was on the premises, stepped out from the cage once or twice, going behind the bar and also into the rear room. Turley claims to have been about ten feet distant from Albrecht, Jr.'s position in the cage, and about 18 inches from Albrecht, Sr., when he was dealing with Maher for whisky and drank the same. It was possible for Albrecht, Jr., to look through the bars, or screen, enclosing the cashier's cage to the point where Turley and Jones were located. Jones was located about a foot from Turley, along the bar with Turley standing between himself and Albrecht, Sr., and Jones does not undertake to state whether the drinks taken by Albrecht, Sr., and party were whisky or intoxicating "but it was mixed up in a glass."

On another occasion, that is, on the 27th day of February, 1924, the same Jones and one Coggins, the latter also in the said "cleanup" service, entered the same premises of Henry Albrecht and Company, and there found the same Maher behind the bar; each called for a drink of whisky, which was served by Maher, and Cog-

gins paid a dollar (\$1.00) therefor, which was rung up in the cash register.

They then called for one-half pint of whiskey, which Maher brought forth from the back room, and delivered the same to the witnesses, Jones and Coggins, for which he paid to Maher \$2.50. Witnesses do not recall whether this amount was rung up on the register or put in Maher's pocket. Albrecht, Jr., was then within the premises and passed back and forth from the front part, to the rear of the enclosure, and had followed Whelan into the rear part when he got the pint of whiskey. Albrecht, Sr., was within the premises in question, but did not know in particular. This occurred at 9:30 in the morning.

On the afternoon of the same day, Jones and Coggins again visited the same premises and found Albrecht, Jr., behind the bar. It does not appear that any intoxicating liquor was purchased or drunk at that time.

On another occasion, viz., on the 19th day of February, 1924, the aforesaid Coggins and one H. W. Whelan, both in the service of the steamship company, contacted upon the premises of Henry Albrecht and Company for the purpose of gathering evidence of law violations in respect to the liquor traffic. The same Whelan Whelan was then on duty, behind the bar, and all these investigations resulted in a drink of whiskey off of Whelan, which was served after being brought from the back room, in little whiskey glasses. Whelan was paid 30 cents per drink, which he rung up in the cash register. Neither of the two, Al-

brechts were on the premises at this time, according to witness Coggins. They also requested a half-pint of whisky but were told by Maher, that he didn't have any right then; that he was short, and that they should return later, when they had a supply on hand.

The following day the same Coggins and Miller again entered the premises of Albrecht and Company, and Albrecht, Jr., was on the premises by the cigar counter and within their sight. Maher was behind the bar. Each asked for a drink of whisky, which was served them by Maher in glasses, which he brought from the rear room and for which he was paid 50 cents per drink.

Plaintiffs in error declined to present any evidence. The Court charged the jury (R. 42-44). No exceptions were taken to any part of the charge.

The jury returned the following verdict:

“We, the jury, find the defendants guilty in manner and form as charged in the information” (R. 15).

Motions, respectively, for a new trial and of judgment were thereupon filed, overruled and exceptions saved (R. 14).

The motion in arrest appears at pages 15-16 of the printed record.

Thereupon the Court rendered the following judgment and sentence:

Judgment (R. 14).

“And now the said defendants, Henry Albrecht, alias Henry Albrecht, Senior, and Henry Albrecht, alias Henry Albrecht, Junior, being arraigned at the bar of the court for sentence, and they having nothing further to say why sentence should not be pronounced against them, it is, therefore, considered and adjudged by the Court that the said defendants, Henry Albrecht, alias Henry Albrecht, Senior, and Henry Albrecht, alias Henry Albrecht, Junior, for the offense by them committed in manner and form as charged in the information, and as found by the jury in this case, each be imprisoned in the Vermilion County, Illinois, jail for the period of six months on each of the first, second and third counts of the information, that they each pay a fine to the United States in the sums of five hundred dollars (\$500.00), on each of the fourth, fifth, sixth, seventh and eighth counts, and that they each be imprisoned in the Vermilion County, Illinois, jail for the period of one year and to pay a fine to the United States in the sum of one thousand dollars (\$1,000.00), together with the costs of this prosecution, on the ninth count of the information; that execution issue therefor, and the said defendants stand committed to the Vermilion County, Illinois, jail until the amount of said fine shall have been fully paid. It is further ordered by the Court that said imprisonment sentences run and be served concurrently.”

To which ruling of the Court the said defendants then and there except, and are given sixty days in which to file a bill of exceptions.

Sentence (R. 15).

“And now the said defendant Thomas Maher, being arraigned at the bar of the Court for sentence, and he having nothing further to say why sentence should not be pronounced against him; it is, therefore, considered and adjudged by the Court that the said defendant, Thomas Maher, for the offense by him committed in manner and form as charged in the information, as found by the jury in this case, be imprisoned in the Vermilion County, Illinois, jail for the period of six months on each of the first, second, third and fourth counts of the information herein—that he pay a fine to the United States in the sum of five hundred (\$500.00) dollars on the fifth, sixth, seventh and eighth counts of the information, and that he be imprisoned in the Vermilion County, Illinois, jail for the period of six months on the ninth count of the information; that execution issue therefor, and that the said defendant stand committed to the said Vermilion County, Illinois, jail until the amount of said fine shall have been fully paid. It is further ordered by the Court that said imprisonment sentences run and be served concurrently.”

To which ruling of the Court the said defendant then and there excepts and is given sixty days in which to file a bill of exceptions.

After judgment plaintiffs in error prayed a writ of error upon petition duly supported by assignments of error (R. 20) and upon such writ, duly allowed (R. 23), the case now comes to this Court.

ERRORS RELIED UPON.

I.

The District Court erred in assuming jurisdiction of the cause and of the plaintiffs in error, as per assignment of error I (R. 20).

II.

The District Court erred in granting leave to file the information and ordering a warrant for the arrest of the plaintiffs in error thereon to issue the same not having been supported by an affidavit showing probable cause in violation of the plaintiffs in error's rights under the Fourth Amendment to the Constitution of the United States, as per assignments of error II (R. 20).

III.

The District Court erred in permitting the Government to re-execute, and to be resworn and reattested, before the Clerk of the District Court, the affidavit filed with and relied upon to support the information as originally filed, pursuant to the leave of Court granted on the 26th day of March, A. D. 1924, in derogation of plaintiffs in error's rights under the aforesaid Fourth Amendment, as per assignment of error III (R. 20).

IV.

The District Court erred in permitting the Government to file two additional affidavits on the 31st day of March, A. D. 1924, after the information in the cause had been filed and the warrant for the arrest of the plaintiffs in error therein named had been issued and executed, and the cause being called for trial, which additional affidavits purport to be amendments of, and to be in substitution of the original affidavit filed with, and relied upon, to support the information when originally filed and the said warrant for arrest issuing by virtue thereof, in violation of the plaintiffs' in error rights under the aforesaid Fourth Amendment, as per assignment of error IV (R. 20).

V.

The District Court erred in overruling the motion of the plaintiffs in error to quash the indictment interposed by the plaintiffs in error by their limited appearance for such purpose and determined by the Court on the 31st day of March, A. D. 1924, immediately prior to the trial of the cause, in violation of the plaintiffs in error's rights and immunities under the Fourth Amendment aforesaid, as per assignment of error V (R. 20).

VI.

The District Court erred in overruling the demurrer to the information, as per assignment of error XXIII (R. 22).

VII.

The District Court erred in overruling plaintiffs in error's motion in arrest of judgment, as per assignment of error VI (R. 20).

VIII.

The District Court erred in each instance in denying each of the several motions for a directed verdict of not guilty filed by the respective plaintiffs in error severally, at the close of all the evidence on the part of the Government, as per assignment of error XXII (R. 22).

IX.

The District Court erred in imposing sentence on the 5th, 6th, 7th and 8th counts charging crimes included within the remaining counts of the information; and thereby the plaintiffs in error were subjected to double jeopardy and punishment contrary to section four of the Fifth Amendment to the Constitution of the United States, as per assignment of error XIX (R. 22).

X.

Upon the consideration of the whole record, the Court erred in sustaining the conviction.

ARGUMENT.

The errors assigned and relied upon to authorize a reversal of the judgment in this case may be dealt with under four general heads.

First. That the information and warrant based thereon are insufficient to give the Court jurisdiction of the parties (plaintiffs in error), because the verification purporting to support the same is insufficient. (Covering specified errors I to V.)

Second. That neither count of the information charges an offense under the laws of the United States. (Covering specified errors VI to VII.)

Third. That, as the plaintiffs in error, Henry Albrecht, Sr., and Henry Albrecht, Jr., the evidence wholly fails to establish their guilt of the crimes for which they stand convicted. (Covering specified error VIII.)

Fourth. The judgment and sentence with respect to certain counts is unlawful as imposing double punishment. (Covering specified error IX.)

I.

The information, and the warrant based thereon, are insufficient to confer, upon the Court, jurisdiction of the parties, because the verification purporting to support the same does not meet the requirements of the Fourth Amendment to the Constitution of the United States.

The verification is deficient in two particulars, viz.:

(a) The affidavits originally subjoined to the information when filed and warrant issued are absolute nullities for the reason that the same were taken before, and attested by, a notary public, who has no authority so to do.

(b) The said affidavits do not contain sufficient averments to show the existence of probable cause.

An information, when made the basis of an application for warrant of arrest, must be supported by an affidavit showing probable cause.

2 Op. Atty Gen. 266;
Weeks v. U. S., 216 Fed. 292 (C. C. of A.);
U. S. v. Michalski, 265 Fed. 839;
Keilman v. U. S. 284 Fed. 845 (C. C. of A.);
U. S. v. Illig, 288 Fed. 939;
U. S. v. McDonald, 293 Fed. 433;
In re Gourdian, 45 Fed. 842;
U. S. v. Tureaud, 20 Fed. 621;
Ex parte Burford, 3 Cranch 448, 2 (U. S.) L. Ed.
495.

The principle above stated finds its basis in the Fourth Amendment to the Constitution of the United States.

When the motion to quash was being presented the Court, interrupting counsel for plaintiffs in error, then said (R. 25):

“These affidavits, Mr. United States Attorney, I think, ought to show that the defendants are officers or employees of Albrecht & Co. These affidavits dis-

close the alleged fact that the liquor was purchased at the place of H. Albrecht & Co.; that they purchased from H. Albrecht & Co., 328 East Broadway, St. Clair County, Illinois, and does not disclose what connection H. Albrecht, Sr., or H. Albrecht, Jr., or either of the other defendants, have with that company, does not show that they are connected in anywise with the commission of the alleged crime. The Court will entertain a motion upon the part of the Government for leave to file additional affidavits."

When these additional affidavits were filed there were no facts alleged in any of them that met the objection which the Court expressed his opinion about, and, in substance, holding that the affidavits were defective in respect to the matters which the Court pointed out.

But when the motion to quash was presented on behalf of plaintiffs in error, although the defect had not been cured, which the Court said existed, nevertheless the Court overruled a motion and called upon the defendants to plead. It is established beyond question that an information may be filed without being verified, where the filing of it does not call for the issuance of a warrant, but it is equally well established that where the filing of the information is such as to call for a warrant to issue, as it did in this case, such information must be supported by proper affidavits.

The affidavits filed originally with the information were sworn to before a notary public and were therefore insufficient.

In **United States v. Schallinger Produce Company**, 230 Fed. 20, the Court, in considering the question of sufficiency of an affidavit where the jurat was by a notary public, said:

“As already stated, the three principal affidavits were taken before notaries public in other states, and the fourth, standing alone, is of no avail. The question, therefore, arises: Can these affidavits taken before notaries be considered by the Court? I am of the opinion that they cannot.

“In **United States v. Curtis**, 107 U. S. 671-673, 2 Sup. Ct. 507, 27 L. Ed. 534, the Court said: ‘So that the underlying question is, whether the notary public whose commission is from the state, was, at the respective dates of the oaths taken by Curtis, authorized by the laws of the United States to administer such oaths. This question, we are constrained to answer in the negative. We are not aware of any Act of Congress which gave such authority to notaries public in the different states at the several dates given in the indictment.’ ”

The Court then comments upon various sections of United States statutes, but adhering to the ruling that affidavits in support of information or other criminal proceedings cannot be taken before notaries.

Such being the case, the information as filed and at the time a motion was made to quash the same was insufficient in law. This must have become obvious to the attorney for the Government, as leave was asked by him from the

Court to have the affidavits resworn to, and after having this done, then asking leave to amend the affidavits when the Court had suggested that the same should be amended. The affidavits were the instruments to which the Court must look in the first instance before a warrant could issue to determine whether or not there was **probable cause**. The affidavits which were on file at the time the warrant issued were **nullities**, and the information was unsupported by any affidavit which would be sufficient under the laws of the United States. When, therefore, the plaintiffs in error were arrested under the warrant, it was without **due process of law**, and when they were brought before the Court, the same affidavits were resworn to before a proper officer and that was the first time, viz., March 31st, that there was any affidavit to support the information and then it was, that when a motion to quash was further urged, that leave was given to **amend** the affidavits, and when they were amended and the motion was still urged against the information, as well as the affidavits, the Court suggested an amendment incorporating **substantive matter which had not appeared in either of the previous affidavits**, and when the Government undertook to amend the affidavits at the suggestion of the Court, the amendment made was not in compliance, nor did it meet the requirements of the matter which the Court suggested should appear in the affidavit. The question then arising was: Could these affidavits be lawfully amended?

In *United States v. Tureaud*, 20 Fed. 621, this question had the attention of the Circuit Court for the Eastern District of Louisiana. A case arose in which the sufficiency of an affidavit in support of an information was the sole question before the Court, and in an opinion by Billings, J., after considering the affidavit upon its merits or sufficiency and holding that the affidavit in support of the information was **insufficient** because it was made upon information and belief, instead of upon positive information, the Court says:

“An offer was made by the Assistant Attorney-General to file another affidavit in the case, should the Court find the one now on file defective. After consulting the authorities, I find that even when the hearing was on a rule to show cause why an information should not be filed, amendments of affidavits were not allowed (*Rex v. Inhabitants of Barton*, 9 Bowl. 1021).”

“Numerous authorities are cited under *Cole Crim. Inf.*, marginal page 51, in support of the doctrine that if a party makes application on insufficient materials, he cannot afterwards be allowed to supply the deficiency, and even though the deficit may be in the jurat, but where, as here, the probable cause has been acted on and the warrant issued, the information must be adjudged either good or bad upon the record, and the affidavit cannot be supplemented any more than upon a hearing under a writ of habeas corpus. A motion to quash must be allowed.”

The foregoing case is cited with approval in *United States v. Michalski*, 265 Fed. 841, and in the consideration of the case of *United States v. Michalski*, *supra*, the Court, after quoting a part of the opinion of 3 Woods 502 Fed. Cas. No. 12,126, says:

“The whole subject was carefully considered by Judge Ray in *United States v. Baumert et al.* (D. C.), 179 Fed. 735, with approval of the principle so carefully pronounced by Judge Bradley. We come down to later cases: *Weeks v. United States*, 216 Fed. 292, is a case where the requisites of informations and the necessity for verifications and accompanying affidavit were considered by the Circuit Court of Appeals in the Second Circuit. The principle is emphasized in the strongest way, that an information, when made the basis of an application for a warrant of arrest, must be supported by an affidavit based on personal knowledge and showing probable cause. Of course, an information need not be based on such affidavit when it is not made the basis for a warrant of arrest.”

The affidavits which were filed in the case at bar were confessedly bad in the first instance, otherwise the Government would not have applied for leave to have the affiants resworn, as was done, and even after that step had been taken, the affidavits were still insufficient, and the Government asked leave to amend the same, but before this was done the plaintiffs in error had been arrested and required to enter into bail. If the rule au-

nounced in *United States v. Tureaud* is a correct one, then the affidavits were not amendable and the motion to quash should have been sustained.

The Supreme Court of the United States in *Rice v. Ames*, 180 U. S. 371-374, 21 Sup. Ct. 406-407, 45 L. ed. 577, said:

“A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion.

“While authorities upon this subject are singularly few, it is clear that a person ought not to be arrested upon a criminal charge upon less direct allegations than are necessary to authorize the arrest of a fraudulent absconding debtor.”

At the time the warrant was issued in this case there were two affidavits filed, the one (Rec., p. 6) setting out that the affiants purchased whisky at the place of Henry Albrecht and Company from Thomas Maher, and that the purchases were made in the presence of Henry Albrecht's son, Henry Albrecht, Jr. This is the only allegation showing **probable cause** for the arrest of Henry Albrecht, Jr., as being guilty of unlawfully selling liquor or having the possession of it, and these affidavits, when the warrant was issued, were absolutely void because taken before a notary public. We submit such an allegation is not sufficient to show a **probable cause** for the

issuance of a warrant charging the illegal sale or illegal possession of intoxicating liquor.

When they were resworn to before an officer who had authority, this added nothing to the substance of the affidavit, and when they were amended a second time there was nothing which showed that the plaintiffs in error, Henry Albrecht, Sr., and Henry Albrecht, Jr., had any connection with Henry Albrecht and Company—the almost that could be said is, that Henry Albrecht, Jr., at one time was seen to occupy a cashier's cage; is not shown to have been doing any business there, but while there cashed a check for the affiant Turley—nor does the testimony in any way connect the plaintiffs in error, Henry Albrecht, Sr., or Henry Albrecht, Jr., with Henry Albrecht and Company. There is an entire lack of proof, either by affidavit or testimony, of just what the Court announced should appear from the affidavits, and although the Court announced such facts must be made to appear in the affidavits, they were not alleged therein, nor was there any testimony offered tending to establish such.

The precise question does not seem to have ever been squarely before the Supreme Court of the United States. However, this Court has found occasion to indicate in a case wherein a related question was the issue, that a citizen cannot be tried on an information, unless it is sup-

ported by the oath of someone having knowledge of facts showing the existence of probable cause.

U. S. v. Morgan, 222 U. S. 275; 56 L. Ed. 198.

The Constitution of the State of Illinois (Sec. 6, Art. II) provides, as does the Fourth Amendment to the Federal Constitution, that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue without probable cause, supported by affidavit," etc., and has held, in **The People v. Clark, 280 Ill. 160 at 165**, in determining whether a criminal information charging the commission of a crime under the laws of the State of Illinois, whereon a warrant is issued for the apprehension of the accused, shall be supported by affidavit; that the said constitutional provision requires an affidavit to support such information.

We respectfully take the liberty to quote from that opinion the following:

"Section 6 of our bill of rights, which is substantially the same as the Fourth Amendment to the Constitution of the United States, expressly declares that no warrant shall issue without probable cause, supported by affidavit. This section is self-executing and its language is too plain to be misconstrued. The only authority for the arrest of the plaintiff in error and holding her for trial was the *capias* or

warrant, and the only foundation for the warrant was the information. To comply with section 6 of the bill of rights, and the laws of this state as construed and announced in the foregoing decisions, either the information itself must be sworn to or there must be a sworn complaint or affidavit charging a violation of the law before a warrant can issue.”

And consistent with the doctrine announced in the Clark case, *supra*, the same court held in the **People v. Honaker**, 281 Ill. 291 at 299: “The only authority for the arrest of the defendant and bringing him to trial was the warrants disregarding the bill of rights, which prohibits the issuing of a warrant upon an information, not supported by oath or affirmation. To say that although the warrants were void, they furnished sufficient basis for a trial, would be trifling with constitutional rights.”

And to the same effect this court held in:

People v. Powers, 283 Ill. 438, 440.

The objection that the information was filed without proper affidavit, or proof of probable cause, was timely and properly made by the motion to quash.

U. S. v. Tureaud, *supra*;

Weeks v. U. S., *Ibid*;

Sampson v. U. S., 241 Fed. 841;

U. S. v. McDonald, 293 Fed. 43;

U. S. v. Schallinger Produce Co., 230 Fed. 290.

Probable cause supported by oath or affirmation prescribed by the fundamental law is the oath or affidavit of a person who of his own knowledge deposes to the **facts** which constitute the offense.

U. S. v. Tureaud, supra;
Veeder v. U. S., 252 Fed. 414 (C. C. of A.).

The primary contention is that there was, in effect, no affidavit supporting the information on the basis of which the warrant for plaintiffs in error was issued, leading to their arrest. Such purported affidavits as were originally attached to and relied upon to support the information were executed before a **notary public**, who had no authority to administer the oath.

U. S. v. Schallinger Produce Company, 230 Fed. 290.

Amending the affidavits after the issuance and execution of the warrant, by substituting new affidavits executed before the Clerk of the District Court, did not have the effect of validating the information as originally filed, and the arrest made thereon, prior to the amendment of the affidavits.

United States v. Tureaud, 20 Fed. 623.

In **U. S. v. Tureaud, supra**, hereinbefore referred to, it is said:

“The adoption of the **Fourth Amendment** effected all kinds or modes for prosecution of crimes or

offenses; for there can be no legal pursuit of accused person, without apprehension. All prosecutions require warrants. And an information, a suggestion of a criminal charge to a court, is a vain thing, unless it is followed by a *capias*. The procedure by information, therefore, after it was acted upon by this amendment, lost its prerogative function or quality. * * * Where, as here, the probable cause has been acted upon, and the warrant issued, the information must be adjudged either good or bad upon the record, and the proofs made by affidavit cannot be supplemented any more than upon a hearing under a writ of *habeas corpus*."

To same effect held in:

Rex v. Inhab. of Barton, 9 Dowl. 1021;
Cole Crim. Inf. Marginal P. 51;
U. S. v. Casino, 286 Fed. 976.

Where an affidavit is the basis of the Court's jurisdiction, and contains a defect of such a nature as to prevent the Court from acquiring jurisdiction of the matter, obviously it cannot be amended.

1 **R. C. L. 774**, citing:

Butcher v. Cappon & Bertsch Leather Co., 148 Mich. 552, 12 Ann. Cases 169;
2 C. J., sec. 124, p. 369;
Cook Co. Brick Co. v. Wm. Bach & Sons Co., 56 Ill. App. 88;
U. S. v. Armstrong, 275 Fed. 506;
U. S. v. Mitchell, 274 Fed. 128.

The affidavits, original, or as amended, are insufficient, **in substance**, to support the information, as against Henry Albrecht, Sr., and Henry Albrecht, Jr., as failing to allege **facts** showing probable cause.

U. S. v. Tureaud, Ibid;
U. S. v. Baumert, 179 Fed. 735;
Weeks v. U. S., 216 Fed. 292 (C. C. of A.);
U. S. v. Michalski, 265 Fed. 839;
Keilman v. U. S., 284 Fed. 845 (C. C. of A.);
U. S. v. Illig, 288 Fed. 939;
U. S. v. McDonald, 293 Fed. 433;
Morgan v. U. S., 294 Fed. 82 (C. C. of A.);
In re Gourdain, 45 Fed. 842;
2 Op. Atty Gen. 266;
Veeder v. U. S., 252 Fed. 414 (C. C. of A.).

The affidavit itself must be sufficient to state facts which justify the issuance of a warrant and the officer is required by law to satisfy himself of the sufficiency of the affidavit and let the circumstances call for the issuance of a warrant.

U. S. v. Borkoski, 268 Fed. 408;
Ripper v. U. S., 178 Fed. 24 (C. C. of A.);
U. S. v. Kaplan, 286 Fed. 963.

Referring to the original joint affidavit of Turley and Jones (R. 6-7)), set out in haec verba in the foregoing statement (p. 13), we find absolutely no allegation connecting either one of the Albrechts with possession or sale of

intoxicating liquor, or the maintenance of the place where the same was possessed and sold as otherwise charged in those affidavits. The transactions detailed are alleged to have occurred at the place of business of "Henry Albrecht and Company, 328 East Broadway, East St. Louis, Illinois," but there is no allegation that either of the Albrechts, who are parties to this record, had any kind of ownership or control of said premises. "Henry Albrecht and Company" may, so far as the affidavits are concerned, be a corporation, as it, in fact, was, and no doubt will be conceded by the Government; but whatever the identity of the concern may have been, neither of the Albrechts are shown to have had any connection with it, or the premises, except that Henry Albrecht, Sr., was present there when affiants appeared and engaged in the transactions related.

The only further allegation referring to Albrecht, Sr., is that he was standing near affiants in a position that he could see the liquor delivered to them by Maher (plaintiff in error), and that said Albrecht was then and there drinking highballs with other gentlemen, which he mixed with whisky, carried from a rear room in whisky glasses by Maher. Not a word in this joint affidavit touching Henry Albrecht, Jr.

We respectfully submit that these allegations are not sufficient to show probable cause that either of the Albrechts mentioned had committed any of the offenses charged in the several counts of the information.

Referring, also, to the original joint affidavit of Miller and Coggins (R. 7), set out in haec verba in the preceding statement of this brief (p. 14), we find even less direct facts which would tend to involve either of the Albrechts in the offenses charged in the information. In these affidavits the same reference is made to the premises as being those of "Henry Albrecht and Company," without any averment connecting either of the two Albrecht persons, with that, corporate or otherwise, except the bald statement that "the purchases (of liquor) were made in the presence of Henry Albrecht, Jr." Not a word connecting Henry Albrecht, Sr., with any of the offenses.

Referring now to the new, or amended, affidavits filed in the course of the hearing of the motion to quash (R. 5-6) and appearing in haec verba in the preceding statement, we find in them no new averments, which would reasonably tend to connect either of the Albrechts with the offenses charged in the information, or to show either of them to occupy any position of personal ownership, personal possession, or personal management of the premises. These amended affidavits are equally deficient with the original affidavits, in failing to show the existence of probable cause that either of the Albrechts, plaintiffs in error, had any guilty connection with the offenses complained of in the information; and these amended and supplemental affidavits cannot lawfully be considered as supporting the information, as originally filed, for the reasons hereinabove set forth.

If it shall be the opinion and judgment of this Court that an information may be filed which is not supported by any affidavit or other testimony showing probable cause and that a warrant may issue thereon against the persons who are charged with crime, and such persons arrested and brought into court, and when they assert their legal rights and challenge such procedure, that an affidavit may then be filed or amended to support the information, and that a person so charged may be arraigned and required to plead, then there is a justification for the conviction of the plaintiff in error Thomas Maher; but if such be held to be the law, there is still no justification for the conviction of the plaintiffs in error Henry Albrecht, Sr., and Henry Albrecht, Jr., because neither the affidavits as they were originally or by any amendment, nor did the testimony which was offered on the trial in any manner connect Henry Albrecht, Sr., or Henry Albrecht, Jr., with the illegal sale of liquor, or with the illegal possession of liquor, unless it shall be held by this Court that one who stands in a place where he sees liquor sold to another without being in any way connected with such sale or possession, becomes liable under the National Prohibition Act to be punished in the same manner and to the extent as the person who actually consummates the act. We refuse to believe that the Court will so hold. This, in effect, is the holding of the trial court and which we respectfully submit does not find any support in any statute or any adjudicated case upon this subject.

II.

Neither count of the information charges an offense under the laws of the United States.

Neither count contains averments to the effect that the intoxicating liquor alleged to have illegally trafficked in by plaintiffs in error **was intended for use for beverage purposes.** The ninth count fails, even, to characterize the liquor **as fit for beverage purposes.**

The traffic in intoxicating liquors proscribed by the National Prohibition Act is only such as is intended **for use for beverage purposes.**

18th Amendment to the Const. of the U. S.;
Secs. 1 and 3, Title II, National Prohibition Act.

The constitutional right to be informed of the nature and the cause of the accusation requires clear and certain statements, including every ingredient of the offense, to be averred in the indictment.

Keck v. U. S., 172 U. S. 437, 43 L. Ed. 505;
Evans v. U. S., 153 U. S. 584, 587, 38 L. Ed. 830,
832;
U. S. v. Hess, 124 U. S. 483, 31 L. Ed. 516;
U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588;
U. S. v. Carll, 15 Otto (105 U. S.) 611, 26 L. Ed.
1135;

U. S. v. Carney, 288 Fed. 163;
U. S. v. Illig, 288 Fed. 941;
14 R. C. L. 185.

Exceptions must be pleaded if necessary to accurately and clearly describe the offense.

U. S. v. Cook, 17 Wall. 168, 173, 174, 21 L. Ed. 539.

As applied to indictments and information under the National Prohibition Act, the trend of authority in the courts of the United States seems to adhere to the rule expounded in the Cook case, *supra*.

U. S. v. Boasberg, 283 Fed. 305;
U. S. v. Dowling, 278 Fed. 630;
Hilt v. U. S., 279 Fed. 421;
U. S. v. Beiner, 275 Fed. 704;
Street v. Lincoln Safe Deposit Co., 254 U. S. 88.

The Supreme Court of Illinois, passing on the sufficiency of an indictment predicated on the Illinois Prohibition Act, substantially in the language of the National Prohibition Act, has expressly held that all exceptions must be pleaded.

People v. Barnes, 314 Ill. 140;
People v. Martin, 314 Ill. 110.

The case of United States v. Casino, 286 Fed. 976, while not referring to the case of United States v. Tureaud,

supra, holds exactly what was held in the Tureaud case. This latter case involves the question of a search warrant of premises upon the allegations that the defendant named had possession of a quantity of whisky. The question arose as to whether the affidavits showed probable cause for the issuance of the warrant. In the opinion by J. Learned Hand (N. Y.) it is said:

“The respondent argues that the petitioner’s present assertion of ownership makes up any deficiency in the proof. So it does, **but it cannot be used.** If the petitioner had suffered a wrong, because his close has been violated and his chattels seized, it is not material that, to obtain redress, he is forced to disclose that he was guilty of a crime. Nor does it make any difference that the fact so disclosed, if known to and stated by the prohibition agents, would have made the search and seizure legal. The Constitution protects the guilty along with the innocent, for reasons deemed sufficient, into which I need not inquire. It means to prevent violent entries till evidence is obtained independently of the entries themselves, or of the admissions involved in seeking redress for the wrong done. Were it not so, **all seizures would be legal which turned out successful.**

“For a similar reason it is not material that the other evidence is absent, which was before the Commissioner and which may have induced him to deny quashal of the warrant. While under section 16 **he must decide after hearing whether on all the facts there were reasonable grounds for the warrant,** that does not dispense with the necessity for allegations in the affidavits themselves, which, if true, show a

self-subsisting ground for the issuance of the warrant. It is not enough that on the hearing other grounds may appear, even though not upon evidence extracted by the search itself. **The showing for the issue must be enough to stand alone**, and must be proved upon the hearing, if challenged. It will not do to abandon the 'reasonable cause' first asserted, **and support the search upon a new charge**. In this respect the affidavits are like pleadings. Other corroborative evidence, no doubt, is admissible for the United States, but the original allegations must in the end be supported. Hence, if those allegations **on their face be inadequate**, the warrant **can by no possibility be legal**. The Constitution means, and Section 5 of Title XI of the Espionage Act (section 10,496 1/4f) contemplates, that the grounds of issuance shall be disclosed **at the time of issue**. Hence, as it seems to me, the petitioner, however guilty in fact, was the subject of an illegal search, and is entitled to a return of the property seized."

If this opinion can be accepted as the law with reference to the issuance of a search warrant it cannot be said with any degree of propriety that the issuance of a warrant to arrest and take a defendant into custody would require a less showing than it would for property. A motion was made to quash this warrant, and if the ruling made in this case is to be sustained as announcing correct propositions of law, the trial court was in error in overruling and denying the motion to quash the warrant.

III.

The plaintiffs in error, Henry Albrecht, Sr., and Henry Albrecht, Jr., are not shown by the evidence to have been guilty of the offenses for which they stand convicted.

It is seriously contended that the District Court erred in refusing the motion, interposed by plaintiffs in error, Henry Albrecht, Sr., and Henry Albrecht, Jr., for a directed verdict of not guilty and the said plaintiffs in error expect to avail themselves of this point under assignment of error VIII, further discussed under the head of "Conclusion" in this brief.

IV.

The judgment and sentence with respect to certain counts is unlawful as imposing double punishment.

It is apparent from an inspection of the counts in the light of the evidence, that the "first count" (R. 1) purports to charge the sale, on the 19th day of February, 1924, of the same liquor charged to have possessed on that day, by virtue of the "fifth count."

That the "second count" charges the sale, on the 20th day of February, 1924, of the identical liquor which, in the "sixth count," is charged to have been, on that day, possessed.

That the "third count" charges the sale, on the 16th day of February, of the same liquor charged in the "seventh count" to have been on that day possessed.

That the "fourth count" charges the sale, on the 27th day of February, A. D. 1924, of the same liquor which is charged in "eighth count" to have been possessed on that day.

In other words, the four sale counts (counts one to four) charge, respectively, the sale of identical liquor charged in the four "possession counts" (counts five to eight).

The Court imposed a sentence (R. 14, 15) as to each of the plaintiffs in error, Albrecht, as follows:

On each of the counts one to three, both inclusive, six months imprisonment.

On each of the counts four to eight, both inclusive, a fine of \$500.00.

Since the evidence shows no other liquor to have been possessed, on the premises, by any of the accused, except that which figured in the several sales testified to under the so-called "sale counts" (counts one to four, both inclusive), it is very evident that any penalty assessed under the corresponding "possession counts" (counts five to eight, both inclusive) is cumulative double, and offensive to the spirit of our administration of the criminal laws.

In brief, we respectfully venture to state our contention to be that the possession of the liquor entering into the sales shown by the evidence is not a distinct and separate offense under the state of this record.

The rule of law governing situations as are disclosed by this record is, that where **a person is tried for a greater offense, he cannot be tried thereafter for a lesser offense necessarily involved in and a part of the greater.**

8 R. C. L., sec. 132, p. 147;

16 C. J., sec. 449, p. 271.

In *Ex parte Nielson*, 131 U. S. 176, 33 L. Ed. 118, this Court held where, as in that case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy.

As applied to a state of facts similar, if not identical, to the facts in this case, under the National Prohibition Act, the Circuit Court of Appeals of the Eighth Circuit held that the possession of a pint of whisky which defendant was convicted of selling does not constitute a separate offense so as to support a distinct penalty.

Muncy v. U. S., 289 Fed. 780, at 782.

CONCLUSION.

(a) The affidavits filed originally in support of the information were insufficient in form and in substance.

(b) The amended affidavits did not show that Henry Albrecht, Sr., or Henry Albrecht, Jr., had any connection with Henry Albrecht & Co., either as officers, agents, employes, or otherwise.

(c) The affidavits charge that the place of business where liquor was purchased was that of Henry Albrecht & Co.

(d) The testimony offered on the trial did not tend to prove that Henry Albrecht, Sr., or Henry Albrecht, Jr., were in any way connected with Henry Albrecht & Co., nor did the affidavits which were filed or the testimony offered tend to prove that Thomas Maher, who sold the liquor, was an agent, employe or servant of Henry Albrecht, Sr., or Henry Albrecht, Jr., or that they furnished the liquor which he sold, or had any control over it, or were in any way instrumental in his making the sale of liquor or had liquor in their possession.

(e) It was error to refuse the peremptory instruction to instruct the jury to find the defendant Henry Albrecht, Sr., and Henry Albrecht, Jr., not guilty.

They were charged jointly with the plaintiff in error Thomas Maher with the unlawful sale and unlawful pos-

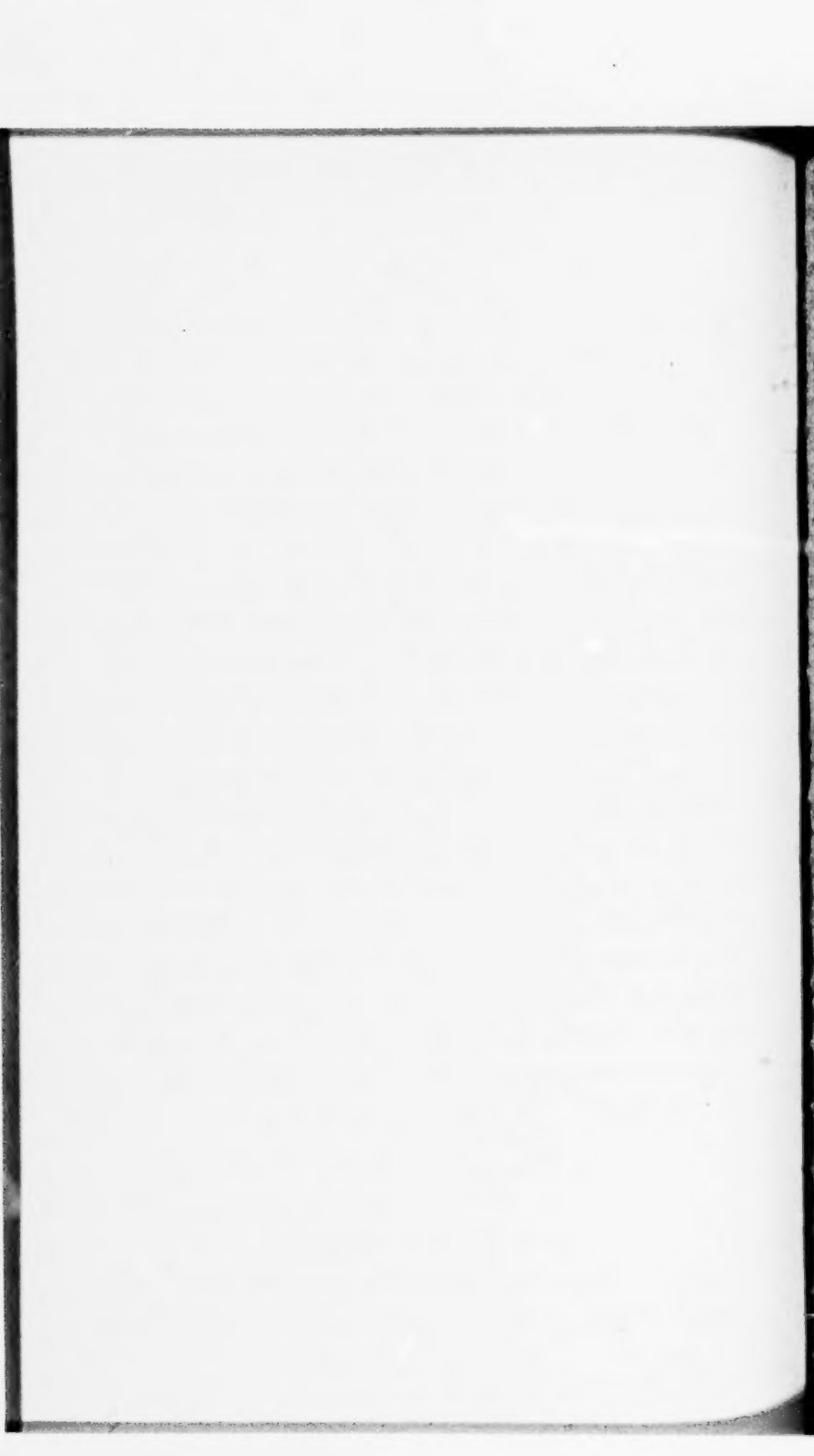
session of whisky, and since there was no testimony that in any way tended to prove that they made the sale or were connected with it directly or remotely, they were not guilty under any count of the unlawful selling, unless it should be established that Thomas Maher, the person who sold the liquor, was acting as the agent or servant of Henry Albrecht, Sr., or Henry Albrecht, Jr., or both of them. The Court had declared before the trial begun that the affidavit should contain averments showing **some relation** between Henry Albrecht, Sr., Henry Albrecht, Jr., and Henry Albrecht & Co. No such relation was ever attempted to be shown, either by averments in the affidavits or by the testimony of any witness, there being no testimony to support the verdict finding the defendants Henry Albrecht, Sr., and Henry Albrecht, Jr., guilty. The Court erred in pronouncing judgment against them and imposing the sentences which were imposed. The burden rested upon the Government to prove the defendants guilty beyond a reasonable doubt. This the Government failed to do. We, therefore, respectfully submit that the judgments and sentences as to Henry Albrecht, Sr., and Henry Albrecht, Jr., should be reversed.

Respectfully submitted,

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D. E. KEEFE,

Attorneys for Plaintiffs in Error.



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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1926

No. 3.

HENRY ALBRECHTth S., HENRY ALBRECHT,
JR., AND THOMAS MATTHEW, PLAINTIFFS IN ERROR,

v.
THE UNITED STATES OF AMERICA.

ON ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF CALIFORNIA.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS
IN ERROR.

CHARLES A. HOUTS,
CHARLES A. KARCH,
For Plaintiffs in Error.



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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1926.

No. 9.

HENRY ALBRECHT, SR., HENRY ALBRECHT,
JR., AND THOMAS MAHER, PLAINTIFFS IN ERROR,

v.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF ILLINOIS.

**SUPPLEMENTAL BRIEF FOR PLAINTIFFS
IN ERROR.**

Plaintiffs in error have filed one brief, in conformity with the rules, but believing a more extended argument will be helpful to the court they have prepared and ask the court to consider this supplemental brief.

Restatement of Case.

On March 26, 1924, the United States Attorney for the Eastern District of Illinois presented to the court an information in nine counts. That part of the first count which bears upon the propositions of law discussed in the supplemental brief was as follows:

“W. O. Potter, United States Attorney in and for the Eastern District of Illinois, who prosecutes on behalf of the United States, in his own proper person comes into court this 26th day of March, A. D. 1924, and by leave of the court, first had and obtained, gives the court to understand and be informed *on the affidavit of J. A. Miller and D. P. Coggins, that Henry Albrecht, alias Henry Albrecht, Senior (Sr.), Henry Albrecht, alias Henry Albrecht, Junior (Jr.), Louis H. Oldenburg, Frank Ellis and Thomas Maher, on to wit*” (here follows statement of offense).

The other counts began in a similar way—that is, they state that the information was on certain affidavits specified in each count. Before the information was filed it was presented to the Court and an order was entered by the Court reciting that,

“The Court having examined said information now orders that the same be filed, and that process issue for the said Henry Albrecht” etc.

The order further directed that bail be fixed at two thousand (\$2,000) dollars (R-1). On the same day the Court entered an order,

"That a bench warrant issue for the arrest of the defendants herein" (R-8).

The bench warrant was as follows:

"The United States of America to the Marshal of the Eastern District of Illinois, Greeting:

"We command you, that you take Henry Albrecht, alias Henry Albrecht, Senior, Henry Albrecht, alias Henry Albrecht, Junior; Louis H. Oldenburg, Frank Ellis and Thomas Maher, if they be found in your district, and them safely keep, so that you have their bodies before our Judge of our District Court of the United States for the Eastern District of Illinois, at the term thereof now being holden at Danville, in the District aforesaid, forthwith, to answer unto the United States of America in an Information for Violation of the National Prohibition Act, and have you then and there this writ."

Return of the marsnal recited:

"I have executed the within writ by arresting the within-named defendants (naming them) at East St. Louis on the 27th day of March, 1924, and now have his body in Court as I am within commanded, this 27th day of March, 1924."

The defendants to the information furnished bond and were admitted to bail. They filed motions to quash and demurrers, both of which they raised the question of the jurisdiction of the Court based upon the claim that the information was not "upon probable cause supported by oath," as required by the Fourth Amendment to the Constitution of the United States.

The Court's attention is directed to the fact that the information does not purport to have been filed under the sanction of the oath of the District Attorney, but shows on its face that it was based upon certain affidavits in each count referred to. The affidavits were sworn to before notaries public who had no authority to administer them, and it is conceded by the Government,

“That the warrant of arrest was void, because probable cause was not supported by oath or affirmation.”

(Government's brief, p. 12.)

ARGUMENT.

It will no doubt be conceded that the use of informations in the United States in the prosecution of offenses is derived from the common law. The common law with respect to their use is modified only by that provision of the Constitution which requires infamous crimes to be presented by indictment and, as is claimed by plaintiffs in error in this case, by the Fourth Amendment to the Constitution of the United States, which prohibits the issuance of warrants unless “upon probable cause supported by oath or affirmation.” There is only one statute expressly authorizing the use of informations, though the National Prohibition Act, by sections 29 and 32 of Title 2 recognizes the practice. The section which expressly authorizes their use in section 1022 of the Revised Statutes, which says:

“All crimes and offenses permitted against the provisions of Chapter 7, Title ‘Crimes’ which are not infamous, may be prosecuted either by indictment or by information filed by a District Attorney.”

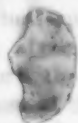
In *U. S. v. J. Lindsay Wells Co.*, 186 Fed., 248, Judge McCall referred to Section 1022 as authority for the use of an information in the prosecution of an offense under the Pure Food & Drug Act. In this he undoubtedly was in error, for the offenses specified in Chapter 7—title, “Crimes”—referred to in Section 1022, are those against the elective franchise and civil rights of citizens. So that statutory provision for prosecutions by information goes no further than to authorize their use in the prosecution of those who offend against the elective franchise and the civil rights of citizens. The restrictive language of Section 1022 coupled with the fact that no other legislative authority for their use existed must have led to the assertion that informations could not be used in prosecutions in cases other than those authorized by that section. For this Court in *Ex parte Wilson*, 114 U. S., 417, was moved to say:

“The provision of Rev. Stat. Sec. 1022, derived from the Civil Rights Act of May 31, 1870, Chap. 114, Sec. 8 (16 Stat. at L. 142), authorizing certain offenses to be prosecuted either by indictment or by information, does not preclude the prosecution by information of other offenses of such a grade as may be so prosecuted consistently with the Constitution and laws of the United States.”

The use of informations, therefore, in the prosecution of such "other offenses," must find its sanction and its limitations in the common law of England as that common law may have been modified by constitutional restrictions; for there are no statutory restrictions. By the common law of England there were two kinds of information recognized in the prosecution of misdemeanors. The first of these mentioned by Blackstone was such as was filed in the name of the king alone by his attorney general with respect to offenses which more particularly tended to endanger the king's government or to interfere with the regular discharge of his royal functions. The other form of indictment was such as was issued upon the information of a private informer with respect to offenses of lesser consequence to the king, such as riots, batteries, libels, etc. In 4th Black. Com. 308 it is said of these two kinds of information:

"The informations that are exhibited in the name of the king alone, are also of two kinds; First, those which are truly and properly his own suits, and filed ex officio by his own immediate officer, the attorney general; Secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer; *and they are filed by the king's coroner and attorney* in the Court of king's bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions filed ex officio by his own attorney general, are properly such enormous misdemeanors as peculiarly tend to disturb

or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution, *without waiting for any previous application to any other tribunal*: which power, thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English Constitution, wherein provision is wisely made for the due preservation of all its parts. The subjects of the other species of information filed by the master of the crown-office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, tumults, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney general) but which, on account of their magnitude or pernicious example, deserve the most public animadversion."



It is to be particularly noted that the first of the informations described by Blackstone was filed by the attorney general in the name of the king upon the initiative of the attorney general alone; that the second kind of information was likewise filed in the name of the king; but that it was filed by the king's coroner or attorney at the relation and upon the complaint of a private informer. Informations filed by the attorney general were under the sanction of his

oath of office which imposed upon him the duty of investigation and the ascertainment of probable cause for the prosecution. Informations filed by the king's corner or attorney upon complaint of a private person originally had no sanction of official or private oath. The facility thus afforded to irresponsible and malicious persons for abusing processes of the courts through unfounded prosecutions led to the adoption of a statute (Stat. 4 & 5 W. & M. c. 18) which required that, before being filed, leave of court should be obtained and that they should be supported by the affidavit of the person at whose instance they were preferred. The statute referred to came to us as a part of the common law of England.

With respect to the two kinds of information as modified by the statute referred to, it has been said:

“Formerly both of these informations could be filed without leave of court and without further oath or affidavit than the oath of office of the officer preferring it; but by an English statute *old enough to be a part of our common law* if applicable to our conditions, it was provided that informations by masters of the crown-office could only be filed by leave of court, and that they must be supported by the affidavit of the person at whose suit they were preferred. Informations by the attorney or solicitor general could still be filed without leave of court and without affidavit or verification” (31 C. J. 625).

From the foregoing it becomes evident that the common law of England as it came to us, to which we must

look for authority to prosecute misdemeanors by information, recognized but two kinds of such. One was preferred under the official oath of the attorney general and required no further verification. The other was likewise preferred by the prosecuting officers upon complaint of an individual which was required to be verified by affidavit. In *Weeks v. United States*, 216 Fed., 292, a case much relied upon by those who deny that the Fourth Amendment to the Constitution applies to informations, it is said that informations as used in the United States are of the kind first mentioned and described by Blackstone, though it is recognized that there are decisions holding to the contrary. The information involved in that case was stated to have been one filed by the district attorney and presumably it was one filed under the sanction of his official oath and without having any foundation in affidavits of private individuals. Hence, for the purposes of the reasoning of that case, the Court properly treated it as of that class which, under the common law of England, could be preferred by the attorney general under the sanction of his official oath. But there is no authority for saying, nor have the courts undertaken to decide, that the second kind of information, to wit, those founded upon affidavits of private individuals, could not likewise be employed in the United States. Both are authorized by the common law and the common law unless modified by our Constitution or laws is the law of criminal procedure in this country.

To which class does the information in the instant

case belong? This information was filed by Potter, the United States Attorney for the Eastern District of Illinois. So at common law were informations of the second class filed by the attorney or coroner for the king. The information in this case recites on its face that it was preferred upon the affidavits of certain persons therein named. It nowhere appears in the information that it had the sanction of the official oath of the United States Attorney; but on the contrary it excludes the idea that the United States Attorney assumed any responsibility for the existence of probable cause for prosecuting the defendants, which alone would justify such prosecution. The distinction between an information of the kind here under consideration and the one preferred under the sanction of the official oath of the prosecuting officer is noted in the case of *U. S. v. Schallinger Produce Co.*, 230 Fed., 290, where a similar information was under consideration. The point of difference was made the basis of the decision in that case which was to the effect that the information there under consideration was invalid for want of verification. The information in this case fits all of the elements enumerated by Blackstone in describing the informations of the second class. It does not fit the description of the informations filed at common law by the attorney general. And the fundamental difference between the informations of the attorney general under the common law and informations based upon complaint or information of private individuals exists with respect to the information under consideration in *Weeks v. United*

States and the information under consideration in this case. The information in the Weeks case was under the sanction of the official oath of the district attorney, which enjoined upon him the duty of investigating and to prosecute only upon probable cause. The information in this case was predicated only upon the affidavits of individuals, which, it is conceded by the government, were in legal contemplation, no affidavits at all.

It is therefore submitted that the information in this case was of the second class of informations recognized at common law and, if this be true, it would be invalid at common law and invalid for all the purposes of this case because, as has been pointed out, informations of that kind were, by a statute which has become a part of the common law, required to be verified by affidavit.

If it be determined that the information in this case is of the kind which at common law was required to be verified by affidavit (and it is conceded that it was not verified), then it follows that the court had no jurisdiction, for, as was said in *Weeks v. United States* above referred to:

“A court can acquire no jurisdiction to try a person for a criminal offense unless he has been charged with the commission of the particular offense and charged in the particular form and mode required by law.”

The same doctrine is thus stated in *31 C. J.*, 559:

“There can be no trial, conviction, or punishment for a crime without a formal and sufficient

accusation. In the absence thereof the court acquires no jurisdiction whatever, and if it assumes jurisdiction, a trial and conviction are a nullity. The accusation must charge an offense; it must charge the particular offense for which accused is tried and convicted; *and it must be made in the particular form and mode required by law.* This is true, not only at common law, but also under constitutional statutory provision in all jurisdictions."

In support of this text are cited—

U. S. v. London, 176 Fed., 976;

4 *Black, Com.*, 301, *et seq.*;

Ex parte Bain, 121 U. S., 1.

Thus far the subject of informations has been presented without any consideration being given to the Fourth Amendment to the Constitution. That amendment is as follows:

"The right of people to be secure in their *persons*, houses, papers, and effects against unreasonable searches and seizures shall not be violated; no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the *persons* or things to be seized."

Whether or not this amendment prohibits the filing of information except "upon probable cause supported by oath or affirmation" has been a question upon which there has been a difference of opinion reflected in many decisions in the Federal courts. The word "in-

formation" is not mentioned in the amendment. The word "warrant" is mentioned.

In *Weeks v. United States*, 216 Fed., 292, the Circuit Court of Appeals for the Second Circuit, in an opinion written by Judge Rogers after a historical review of the subject of informations at common law and of the practices which led to the adoption of the Fourth Amendment, concluded that the prohibition of that amendment applied only to warrants and did not apply to informations. Other courts have reached a contrary conclusion, but it is fair to say that since that opinion was written the views therein expressed have been adopted by a greater number of courts than those taking the contrary view.

The precise point has never been before this Court for decision, but it is significant that this Court, in *United States v. Morgan*, 222 U. S., 275, *obiter dictum* as is claimed, said:

"A further answer is that as to this and every other offense the Fourth Amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an information unless it is supported by the oath of some one having knowledge of facts showing the existence of probable cause. Nor can an indictment be found until after an examination of witnesses, under oath, by grand jurors—the chosen instruments of the law to protect the citizen against unfounded prosecutions whether they be instituted by the Government or prompted by private malice."

In the Weeks case the Court reviews at great length the history of informations to demonstrate that the information used in this country is the one which at common law was filed by the Attorney General and without verification. After so doing, it comes to a consideration of the application of the Fourth Amendment to the subject of informations and seizing upon an excerpt from Story's Commentaries on the Constitution, wherein he said: "It (the Fourth Amendment) is little more than the affirmance of a great constitutional doctrine of the common law," it deduces the conclusion that the Fourth Amendment did not change the common law which permitted the Attorney General (and in this country the United States Attorney) to file information without verification. The opinion then takes note of the decision of the State courts, where similar provisions in State constitutions were under consideration. The cases thus cited show that in Colorado, Kansas, Illinois, Ohio, Oklahoma, Texas, and Wyoming the courts have held that provisions similar to the Fourth Amendment require that informations be verified, while in Louisiana, Oregon, and New Mexico the contrary conclusion had been reached. The question of the application of the Fourth Amendment to prosecutions in the Federal courts is then disposed of in the following brief fashion:

"But the right secured to the individual by the Fourth Amendment, as we understand it, is not a right to have the information, by which he is accused of crime, verified by the oath of the

prosecuting officer of the Government or to have it supported by the affidavit of some third person. His right is to be protected against the issuance of a warrant for his arrest, except 'upon probable cause supported by oath or affirmation, and naming the person against whom it is to issue.' If the application for the warrant is made to the court upon the strength of the information, then the information should be verified or supported by an affidavit showing probable cause to believe that the party against whom it is issued has committed the crime with which he is charged. But, if no warrant is issued, no arrest has been made, and the person has voluntarily appeared, pleaded to the information, been tried, convicted, and fined, we fail to discover wherein any right secured to him by the Fourth Amendment has been infringed."

But can so important a constitutional question be dismissed upon a consideration merely of the literal construction of the Fourth Amendment and without consideration of its purpose and its historical background? The fact that it was placed in the Constitution is conclusive evidence that there were serious abuses which the people of the United States intended forever to prevent.

The history of this amendment and the causes leading to its adoption are related in the opinion of this Court in *Boyd v. United States*, 116 U. S., 616. These causes are thus described by Judge Cooley:

Sec. 1902:

“This provision (Fourth Amendment) seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmance of a great constitutional doctrine of the common law. And its introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants, almost upon the eve of the American Revolution. Although special warrants upon complaints under oath, stating the crime, and the party by name against whom the accusation is made, are the only legal warrants upon which an arrest can be made according to the law of England, yet a practice had obtained in the secretary's office ever since the restoration (grounded on some clauses in the acts for regulating the press) of issuing general warrants to take up, without naming any persons in particular, the authors, printers and publishers of such obscene or seditious libels as were specified in the warrant. When these acts expired in 1694 the same practice was continued in every reign, and under every administration, except the last four years of Queen Anne's reign, down to the year 1763. The general warrants, so issued, in general terms authorized the officers to apprehend all persons suspected, without naming or describing any person in special. In the year 1763 the legality of these general warrants was brought before the king's bench for solemn decision, and they were adjudged to be illegal and void for uncertainty. A warrant, and the com-

plaint on which the same is founded, to be legal must not only state the name of the party, but also the time and place, and nature of offense with reasonable certainty."

The aggravating practices thus referred to by Judge Cooley, and referred to also by this Court in the *Boyd* case, led to the adoption of the Fourth Amendment. That the issuing of "general warrants," wherein no particular person was named, was one of the abuses sought to be prevented by the Fourth Amendment, is apparent from what Judge Cooley has said; but the wording of the amendment indicates that other abuses as well were in the minds of the framers of that amendment; for even though the warrant be special (as distinguished from the "general" warrants referred to by Judge Cooley), the Fourth Amendment permitted its issuance only "upon probable cause, supported by oath or affirmation." What is meant by the word "supported"? What is a warrant? A warrant is nothing more than the process of the court by which it acquires jurisdiction over the person of the defendant (4 *Blackstone*, 318).

In 16 C. J., 298, it is said:

"Since the only function of the warrant in a criminal case is to enable the court to acquire jurisdiction of the person of the defendant by bringing him before the court to answer the charge made against him, where a person is *arrested lawfully*, without a warrant and is immediately taken before the court, there is no necessity for a warrant."

And as a warrant is the mere process by which the court acquires jurisdiction of the person of a defendant, and as the support or foundation for the issuance of the warrant is the lodgment of an information or indictment, by which alone the court acquires jurisdiction, is it not fair to conclude that the framers of the Fourth Amendment, when they said that "no warrants shall issue but upon probable cause, supported by oath or affirmation," referred to the information or indictment which supported the warrant? If the Fourth Amendment means that the warrant and not the information was in the minds of the framers thereof, consider, if Your Honors please, what showing of probable cause and what oath or affirmations could be made to justify the issuance of the warrant? If a sufficient information be filed by a duly authorized official in a court having competent jurisdiction, charging a named individual with the commission of a completely described offense, should not the warrant be issued without anything further? The regularity of the proceeding, and the fact that the defendant was sufficiently charged by one having authority to make the charge in a court having jurisdiction to try the offense, would seem to furnish a complete and sufficient reason for the issuance of the process which would bring the defendant before the court. What should the supporting affidavits contain? Should they recite merely that an information had been filed by proper official in a court having jurisdiction charging the defendant with a defined violation of law? Or should they contain statements

of fact showing probable cause for believing the defendant guilty of the offense charged? If the latter, are not such in reality a justification for the filing of the information rather than a justification for the issuance of the warrants?

Consider the results which would flow from the holding that the Fourth Amendment affected only the process or warrant by which the court acquires jurisdiction of the person and does not affect the information or indictment by which the court acquires jurisdiction of the subject-matter. If such should be found to be the law, then it would follow that a court, in which a perfectly good information has been filed by a United States district attorney having authority to file it, charging a known defendant with a crime, would be powerless to proceed until and unless some one filed an affidavit showing probable cause or unless the person named as a defendant voluntarily submits to a trial.

It is paradoxical to state that a court has jurisdiction to try an information duly filed before it charging a defendant within its jurisdiction with a crime, but that it has no power to compel the defendant to submit to trial.

The impossible situations resulting from the holding that the Fourth Amendment was directed only at the warrant and not at the accusation point to the fallacy of that holding. They were noted by Judge Billings of the Eastern District of Louisiana in the case of *U. S. v. Turcaud*, 20 Fed., 621, wherein he said:

“But the adoption of the Fourth Amendment affected all kinds and modes of prosecution for crimes or offenses, for there can be no legal pursuit of accused persons without apprehension. All prosecutions require warrants. An information, a suggestion of a criminal charge to a court, is a vain thing, unless it is followed by a *capias*. The procedure by information, therefore, after it was acted upon by this amendment, lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation—not by kings because we have in the department of criminal law no successor to him, so far as he represented a right to institute, if it pleased him, unsupported incriminations. Nor by the district attorney nor any other officer of the United States, for the Constitution has said in effect that in no way nor manner shall magistrates or courts issue warrants, except upon proofs, which are to be upon oath and make probable excuse.”

The case last referred to was decided in 1884. Before that Judge Dillon, in *U. S. v. Maxwell*, 3 Dill., 275, had said:

“We are of the opinion, therefore, that offenses not capital or infamous may in the discretion of the court be prosecuted by information. We cannot recognize the right of the district attorney to proceed on his own motion, and shall require probable cause of guilt to appear by the oath of some credible person before we will allow an information to be filed and a warrant of arrest to issue. But with these safeguards there is no more reason to fear an oppressive

use of information than there is reason to fear an abuse of the powers of the grand jury."

While the Fourth Amendment was not mentioned by Judge Dillon, it is evident, from the language he used, that the Fourth Amendment was in his mind.

The principles announced in these two cases were accepted without question until the contrary view was put forward in the Weeks case. It was reflected in the opinion of this Court in *United States v. Morgan* above referred to. It is submitted that the conclusions in the Weeks case are not supported by a consideration of the reasons which led to the adoption of the Fourth Amendment; that they are contrary to the previous rulings of the Federal courts; that they are contrary to the great weight of authority as reflected in the decisions of the State courts referred to in the opinion in the Weeks case; and that no substantial reasons leading to them were given in the opinion or can be given.

But even if the Fourth Amendment be interpreted as applying only to the warrant as distinguished from the information, there is yet one very important question which should be decided by this Court. The Government has conceded that the warrant was void by reason of the provisions of the Fourth Amendment. The warrant, as has been pointed out, was the process by which alone the court could acquire jurisdiction of the persons of the defendants, unless they should voluntarily appear when the information was filed. They did not voluntarily appear. The warrant, though positively prohibited by the Fourth Amendment, was

issued and under it they were seized and taken before the court. Rather than go to jail they gave bond and were admitted to bail. This was not a voluntary appearance. As to such a situation the Supreme Court of Wisconsin said, in *Brosde v. Sanderson*, 86 Wis., 368:

“It is claimed that this defect or loss of jurisdiction was waived by the appearance of the plaintiff, without objection, on the 4th of August. Conceding that such a jurisdictional error might be waived in a criminal case by an appearance without objection, it is very certain that the appearance must be a voluntary one to have such an effect. In this case the appearance on August 4 can not be called voluntary. He had been compelled to give bond and deposit money to secure his appearance, and he was compelled to appear in order to avoid default on his bond and loss of the money deposited. Such an appearance is substantially coerced. It would be a misnomer to call it voluntary.”

Following the giving of the bond the defendants protested the jurisdiction of the court by motions to quash the warrant and the information because of lack of verification and by demurrers putting forward the same objection. This they did up to the very time they were compelled to enter a plea and go to trial. These facts show that their presence in court, which presence alone gave the court jurisdiction, was compelled by the warrant of arrest which was invalid because prohibited by the Fourth Amendment.

This question is therefore squarely presented:

Can a court acquire jurisdiction of a defendant through a process prohibited by the supreme law of the land? The Government takes the position that it can, and in support of that position cites a line of cases, of which

Ker v. Illinois, 119 U. S., 436, and
Petterbone v. Nichols, 203 U. S., 193

are illustrations. It is submitted that those cases are inapplicable. In each of them the defendants had been wrongfully taken into the territorial jurisdiction of the court and there served with the process necessary to confer jurisdictions over their persons. In those cases the court held that the fact that they had been wrongfully taken into the territorial jurisdiction of the court did not relieve them from lawful process thereafter served upon them. Those cases are fundamentally different from this. Here the jurisdiction of the court over their persons was not acquired by lawful process. It was acquired, if at all, by process prohibited by the Constitution. They did not thereafter voluntarily submit to the jurisdiction. They at all times protested the jurisdiction. In this situation can it be possible to rightfully say that the resulting trial and conviction can be sustained, although their rights were violated and the Constitution was violated in the process of bringing them to trial?

In the case of *Boyd v. United States*, 116 U. S., at page 635, this Court, with respect to a similar situation, said:

“Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and most repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. *This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be ‘obsta principiis’.*”

What the court said there is applicable here. The initial step which forced the defendants into the jurisdiction of the court was wrongful because prohibited by the Constitution. Without such wrongful act on the part of the government no prosecution could have ensued. What followed thereafter was in consequence of the wrong done to plaintiffs in error by arresting them under a void warrant and forcing them into the presence of the court. If the wrong be excused and the consequences thereof be ignored, then all vitality is taken from the constitutional amendment. As was said in the Boyd case, it is the duty of the court to

condemn the wrong and to undo all the proceedings predicated thereon.

Summarizing, plaintiffffs in error say that the District Court was without jurisdiction of the offense because

(a) the information filed was such as at common law required verification, and there was no verification;

(b) under the Fourth Amendment an information is required to be verified, and there was no verification;

that there was no jurisdiction of the persons of plaintiffs in error because the warrant of arrest through which jurisdiction of their persons was required was void under the Fourth Amendment of the Constitution of the United States. They say also, for the reasons given, the District Court, being without jurisdiction for want of a proper information, could not permit amendments to cure the defects originally inhering in the information, in support of which they cite *Ex parte Bain*, 121 U. S., 1.

Upon the foregoing considerations they respectfully ask that the judgment below be reversed.

CHARLES A. HOUTS,
CHARLES A. KARCH,
For Plaintiffs in Error.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 9

HENRY ALBRECHT, SENIOR; HENRY ALBRECHT,
Junior, and Thomas Maher, Plaintiffs in Error

v.

THE UNITED STATES OF AMERICA

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF ILLINOIS*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The case has been brought here directly from the District Court, which rendered no opinion.

JURISDICTION

The judgment of the District Court was entered March 31, 1924. (R. 12, 14, 19.) The petition for writ of error was filed May 2, 1924. (R. 19.)

It was asserted in the trial court—

(1) that by reason of defects in the information and of defects in the warrant, under which the

defendants were arrested and brought before the court, the District Court had no jurisdiction over the defendants (R. 9-12; 15-18), and

(2) that owing to defects in the information and warrant of arrest the accused were deprived of rights guaranteed by the Fourth Amendment to the Constitution of the United States (R. 16, Par. VI, motion in arrest).

These points are reiterated in the assignments of error. (R. 20-22.)

The writ was sued out under Section 238 of the Judicial Code, as it stood prior to the effective date of the Act of February 13, 1925.

THE QUESTIONS

The questions presented are whether the District Court was without jurisdiction to try the defendants on an information because the information was unverified, and because the warrant of arrest under which the accused were brought into court was void since it was not based on a showing of probable cause supported by oath, as required by the Fourth Amendment, although after the arrest and before trial the accused gave bond to appear. There are other points involving (a) sufficiency of the allegations of the information, (b) whether there was evidence to warrant submission of the case to the jury as to the two Albrechts, and (c) whether the sentence imposed double punishment. Of the 27

assignments of error only 10 are relied on (Br. 25-27), and these 10 are combined under 4 general heads, as follows (Br. 28):

First. That the information and warrant based thereon were insufficient to give the court jurisdiction of the plaintiffs in error, because the verification purporting to support the same was insufficient. (Covering specified errors I to V.)

Second. That neither count of the information charges an offense under the laws of the United States. (Covering specified errors VI to VII.)

Third. That, as to the plaintiffs in error, Henry Albrecht, Sr., and Henry Albrecht, Jr., the evidence wholly fails to establish their guilt of the crimes for which they stand convicted. (Covering specified error VIII.)

Fourth. The judgment and sentence with respect to certain counts is unlawful as imposing double punishment. (Covering specified error IX.)

STATEMENT

On March 26, 1924, the United States Attorney filed in the District Court of the United States for the Eastern District of Illinois an information in nine counts, charging the plaintiffs in error in four counts with having sold liquor, in four other counts with having possessed liquor, and in one count with having maintained a common nuisance, in violation of the National Prohibition Act. (R. 1-5.) The

information was not verified. To it were attached two affidavits, each signed and sworn to before a notary public, by two of the agents who were mentioned in the information as having purchased the liquor, or as having seen it in the possession of the defendants. (R. 6-7.)

On the same day the court ordered a bench warrant to issue for the arrest of the defendants. (R. 8.) The warrant was issued (R. 18) under date of March 26th, and under the date of March 27th (R. 19) the marshal signed a return that he had executed the writ and had the defendants in court (R. 19).

After their arrest, and on March 26th or March 27th, the plaintiffs in error here gave bond to appear and answer the information and were released from custody, and were not thereafter in custody by virtue of the warrant or otherwise, and their subsequent appearances in court were in response to their bond. The fact of their giving bail is not disclosed by the original printed record, which is incomplete, but before this case is argued it is expected the record will be supplemented to show the facts.

On March 28, 1924, the plaintiffs in error appeared specially and filed a motion to "quash the information and each count thereof" on the ground that it did not state an offense and because it was not supported by sufficient affidavits to show probable cause and because the information and affida-

vits attached to it were not sufficient to authorize the issuance of a warrant of arrest. (R. 8-9.) This motion was directed only to the information, and at the time it was filed plaintiffs in error were not in custody and had been released on bond and were not held under the warrant. This motion seems to have been brought on for hearing on March 31, 1924, when the case was called for trial.

The United States Attorney, to meet the suggestion that the information required verification and that somehow at that stage of the proceedings the validity of the warrant could be questioned, met the point that the affidavits originally attached to the information were sworn to before a notary public by asking leave to have the affidavits resworn before the Clerk of the court and refiled. (R. 24-26.) This leave was granted, together with permission to file some supplemental affidavits to meet the contention made that probable cause was not sufficiently shown by the original affidavits. After the original affidavits were resworn and refiled and supplemental affidavits fortifying probable cause were filed, counsel for the accused asked leave to refile their motion to quash so as to reach the information and corrected and additional affidavits. Leave was granted (R. 24-25), and a new motion to "quash the information and each count thereof, and the warrant issued on the same" was filed (R. 9-10), the grounds being that the information did

not state an offense and was not a sufficient basis for the issuance of any warrant because not properly verified, and that the original affidavits upon which the warrant had been issued were made before a notary public, not authorized to administer oaths in such proceedings. By this motion the accused moved not only to quash the information but to quash the warrant. The motion was denied, and thereupon a demurrer to the information was interposed on the same grounds, and that was overruled (R. 11-13), and the case proceeded to trial.

While the record speaks of amendments to the information, as a matter of fact the information was never amended. The affidavits filed with it were amended by being resworn before a proper official, and some supplemental affidavits were filed, but the information, as a criminal pleading, was not changed.

SUMMARY OF ARGUMENT

✓ The validity of the information as a criminal pleading forming a basis for trial and the validity of the warrant of arrest are distinct matters. An information as a basis for prosecution and trial in the Federal courts does not require a verification or supporting affidavits, and the jurisdiction of the court to try the defendants under an information is not affected by the fact that it is not verified. A warrant of arrest based on the information is void ✓ unless the information is verified or supported by a properly sworn affidavit, as required by the Fourth

Amendment, but the invalidity of the warrant does not affect the validity of the information as such. The issuance of a valid warrant of arrest is not a condition precedent to the court having jurisdiction to try the accused on the information. ✓

In the present case the information was valid, but the warrant was void because the affidavits were not sworn to before an officer authorized to administer oaths in criminal proceedings in the Federal courts. Although the accused were brought into court by virtue of a void warrant, there was thereafter no unlawful detention. Upon their arrest, the accused having given bail, the warrant of arrest had performed its office and they were thereafter held by virtue of their bonds and not by force of the warrant. In any event, before their trial proceeded, proper affidavits were filed showing probable cause supported by oath justifying the detention of the accused if they had not appeared in response to their bonds. The fact that a defendant is brought into the jurisdiction or custody of a court illegally does not deprive the court of jurisdiction to try him, at least where he is not detained illegally after coming within the jurisdiction or after being taken into court. ✓

Finally, all attacks made by the accused on the warrant or the arrest were coupled with attacks on the validity of the information. The information was valid and the motion to quash it was properly denied. Where a motion is too broad and asks for

some relief to which the moving party is not entitled it is not error to deny the whole.

The allegations of the information sufficiently charged an offense against the United States. There was evidence sufficient to support the verdict against the two Albrechts, and double punishment was not imposed.

ARGUMENT

I

THE INFORMATION WAS VALID, THOUGH NOT VERIFIED,
AND THE INVALIDITY OF THE WARRANT OF ARREST
DID NOT DEPRIVE THE COURT OF JURISDICTION TO TRY
THE DEFENDANTS

The plaintiffs in error have confused the matter of the sufficiency of the information as a criminal pleading and as a basis for trial with the question of the validity of the warrant of arrest on which the accused were first brought into the presence of the court.

An information in the Federal courts as a basis for prosecution and trial does not require a verification or supporting affidavits.

In England, before the Revolution, informations were of two kinds—those filed by the Attorney General or Solicitor General and those filed by Masters of the Crown. At common law the former did not require verification or supporting oaths. The oath of office of the official filing it was considered sufficient to afford verity to its allegations.

The provision of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on indictment left informations available in the Federal Courts for prosecution of minor offenses. It is settled by the decisions that in this country informations filed by prosecuting attorneys are like those filed in England by the Attorney General and Solicitor General, and require no verification as a basis for trial and punishment unless there be some statutory provision requiring verification.

Section 1022 of the Revised Statutes, which provides that—

All crimes and offenses * * * which are not infamous, may be prosecuted either by indictment or by information filed by a district attorney,

imposes no requirement that the information must be verified. It is clear that an information in the Federal courts to be valid as such—that is, a basis for prosecution, trial and sentence—need not be verified.

The validity of a warrant of arrest issued to bring the accused to the bar for trial on the information is another matter, because of the requirements of the Fourth Amendment, that no warrant shall issue but upon probable cause supported by oath or affirmation. If a warrant of arrest is based on an information, the warrant is invalid unless the information is verified or supported by affidavits, but the invalidity of the warrant does not

affect the validity of the information. Some decisions of the Federal courts disclose confusion on this subject, and seem to consider the issuance of a valid warrant of arrest a condition to the court's acquiring jurisdiction to try the defendants on the information, and treat the information as invalid because not sufficient as a basis for a warrant of arrest. *United States v. Tureaud*, 20 Fed. 621; *United States v. Wells*, 225 Fed. 320. There is a dictum in the opinion in *United States v. Morgan*, 222 U. S. 274, that one "cannot be tried on an Information unless it is supported by the oath of some one having knowledge of the facts showing the existence of probable cause." Later decisions have clarified this subject and pointed out the distinction between the validity of the information as such and its sufficiency to support a warrant of arrest, and have pointed out that the defendants may be tried on an unverified information, and that the matter of its sufficiency to support a warrant of arrest is immaterial, except when an attack is made on the warrant itself or the detention of the accused under it.

The propositions above stated are supported by the following cases:

Weeks v. United States, 216 Fed. 292 (C. C. A., 2d Circuit), certiorari denied, 235 U. S. 697.

Kelly v. United States, 250 Fed. 947 (C. C. A., 9th Circuit); certiorari denied *Galen v. United States*, 248 U. S. 585.

United States v. Newton Tea & Spice Co., 275 Fed. 394. In this case the accused appeared voluntarily without a warrant.

United States v. McDonald, 293 Fed. 433. In this case the defendant was already in custody, having been arrested before the unverified information was filed.

Morgan v. United States, 294 Fed. 82 (C. C. A., 4th Circuit). In this case the record did not show an arrest upon a warrant based on information.

Jordan v. United States, 299 Fed. 298 (C. C. A., 9th Circuit).

Vollmer v. United States, 2 F. (2d) 551 (C. C. A., 5th Circuit). In this case the record did not show that the unverified information was used as a basis for a warrant of arrest.

Ryan v. United States, 5 F. (2d) 667 (C. C. A., Fourth Circuit).

Merrill v. United States, 6 F. (2d) 120 (C. C. A., 9th Circuit).

Miller v. United States, 6 F. (2d) 463 (C. C. A., 3rd Circuit). In this case the accused was tried on an unverified information after a voluntary appearance.

Christian v. United States, 8 F. (2d) 732 (C. C. A., 5th Circuit). In this case, where a demurrer was interposed to an unverified information, the court said that "logically, the only advantage a defendant could take of an unverified information would be to secure his release from custody, because there was no proper warrant of arrest," where the information is the basis for the warrant.

It is likewise settled in the State courts that no warrant of arrest is needed as a basis for jurisdiction for trial on an information.

Holcomb v. Cornish, 8 Conn. 375.

Commonwealth v. McGahey, 11 Gray, 194.

We have been unable to find any statute giving authority to notaries public to administer oaths in criminal proceedings in the Federal courts, and for the purposes of this case we concede that the warrant of arrest was void, because probable cause was not supported by oath or affirmation.

Although the defendants were brought into court under a void warrant, they were not thereafter illegally detained. Upon their arrest, on March 26, 1924, they gave bail and were released from custody, and they were held thereafter under their recognizances. It is settled that a warrant of arrest becomes *functus officio* where the accused enters into a recognizance, and that entering into a recognizance for his appearance is a waiver of all defects in the warrant, as the accused is thereafter held under the recognizance.

State v. Queen, 66 N. C. 615.

Ard v. State, 114 Ind. 542.

State v. Downs, 8 Ind. 42.

The principle is further illustrated by the rule that a waiver of preliminary examination is a waiver of all defects in the warrant of arrest. *People v. Harris*, 103 Mich. 473.

The propositions above stated lead to the conclusion that when the plaintiffs in error appeared

for trial, and even before any corrections were made in the affidavits, there was a valid information on file forming a proper basis for the jurisdiction of the court and the accused were in court, not detained by any illegal process but held by virtue of their bonds, the giving of which had waived any defects in the warrant of arrest, and the warrant itself having been executed, they were not held by virtue of it. Before the trial commenced, by the reswearing of the affidavits and by the filing of the supplemental affidavits, there was on file a proper showing of probable cause supported by oath or affirmation, which then justified the detention of the defendants if there had been any necessity for ordering them into custody, but the issuance of a new warrant of arrest would have been futile because the accused were already in court, bound to appear under their bonds.

The only irregularity in the proceedings was over and done with before the trial commenced. It is settled that a court is not deprived of jurisdiction to try the accused merely because the accused was illegally brought into the jurisdiction of the court where, after he arrives in the jurisdiction, he is held by lawful process.

Ker v. Illinois, 119 U. S. 436.

Cook v. Hart, 146 U. S. 183.

Pettibone v. Nichols, 203 U. S. 193.

Lamar v. United States, 274 Fed. 160;
affirmed *per curiam* in 260 U. S. 711.

United States v. Unverzagt, 299 Fed. 1015.

In this case, the fact that the defendants were brought into the presence of the court in the first instance by an arrest under an invalid warrant did not affect the jurisdiction of the court to try them on a valid information, where they were not, at the trial, held in custody under any illegal process and had waived all defects in the validity of the warrant of arrest by giving bond to appear.

The invalidity of the warrant and illegality of the arrest did not render the defendant immune from prosecution under the information.

If the accused had not waived defects in the warrant of arrest by giving bond, there are other grounds on which their attack on the validity of the warrant and of their arrest was properly resisted. Assuming that attack on the validity of their arrest and detention could be made by motion to quash the warrant and for discharge from custody rather than by habeas corpus, their attack on the warrant was defective because coupled with a motion to quash a valid information. Their first motion was directed at the information alone. The substitute motion was a motion to quash the information and the warrant. The motion to quash the information was not well grounded and was properly denied. It is settled that if a motion is too broad and asks for some relief to which the moving party is entitled, it is not error to deny the whole. *Smith v. Brown*, 8 Kans. 608, 619; *Beebe v. Latimer*, 59 Nebr. 305; *Minnick v. Hough*, 41 Nebr. 516; *Smith v. Zaner*, 4 Ala. 99, 105; *National State*

Bank v. Delahaye & Purdy, 82 Iowa 34; *Chicago Great Western Ry. Co. v. McDonough*, 161 Fed. 671; *Elliott v. Peirsol*, 1 Pet. 328, 338. Some of these cases deal with motions to strike out evidence, some of which was competent and some of which was not. Some deal with motions to vacate orders granting new trials to two parties, one of whom was entitled to a new trial and the other of whom was not. Others deal with joint motions for new trial, where one party was entitled to it and the other was not. In the case of *Elliott v. Peirsol*, which dealt with a motion to strike out evidence, some of which was competent and some of which was not, it was said:

The court was not bound to do more, than respond to the motion, in the terms in which it was made. Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection.

As every step that was taken in the present case to assail the warrant of arrest or the detention was coupled with a groundless attack on the information as such, the overruling of the motions and demurrer were proper.

Again, if the defendants had not given bond and had been held in custody by virtue of an invalid warrant, it would have been error to discharge them from custody because of defects in the original arrest after probable cause for detention was shown by properly verified affidavits.

Nishimura Ekiu v. United States, 142 U. S. 651, 662.

Mahler v. Eby, 264 U. S. 32, 42.

The sufficiency of the allegations of the information to state an offense is discussed below and has no relation to the question of jurisdiction.

The considerations above set forth dispose of all of the assignments of error involving the constitutional questions or the jurisdiction of the court to try the accused.

II

THE INFORMATION ADEQUATELY CHARGES OFFENSES AGAINST THE UNITED STATES

In support of their assertion that the information in this case fails to charge any offense against the United States, plaintiffs in error say that the traffic in intoxicating liquors proscribed by the National Prohibition Act is only such as *is intended for use for beverage purposes*; that in no count of the information is it alleged that the intoxicating liquor charged to have been trafficked in by plaintiffs in error *was intended for use for beverage purposes*, and that the ninth count fails even to characterize the liquor *as fit for beverage purposes*. This argument of plaintiffs in error is premised upon too narrow a view of the scope and effect of the National Prohibition Act. It is true that the prohibition of the Eighteenth Amendment is against "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the

exportation thereof from the United States * * * for beverage purposes," but in the enforcement of that constitutional provision Congress has seen fit, in the National Prohibition Act, to regulate the traffic in intoxicating liquors even though intended for nonbeverage use. For example, Section 3 of Title II provides that "Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold * * * and possessed, *but only as herein provided*," and Section 4 of the same title requires a permit for the purchase of intoxicating liquor intended for use in the manufacture of the nonbeverage articles enumerated in that section. The fallacy of plaintiffs in error's argument is further illustrated by the definition of "intoxicating liquor" contained in Section 1 of Title II. That section provides that—

When used in Title II and Title III of this Act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: * * *.

It is no part of the foregoing definition that the articles therein named or described shall be "in-

tended for use for beverage purposes"; it is sufficient that they shall be "fit for beverage purposes."

The information was in nine counts. A comparison of them with the sections of law upon which they were based shows clearly that each count followed the statute and sufficiently charged an offense against the United States.

The first four counts charged unlawful sales of liquor. The first charged that the defendants—

* * * on to wit, the 19th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully sell a large quantity of intoxicating liquor, to wit;—two drinks of whisky, which said whisky then and there contained more than one-half of one per cent of alcohol by volume, and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. (R. 1-2.)

Except that different dates and quantities of whisky were alleged therein, the second, third, and fourth counts charged the defendants with illegal sales of intoxicating liquor in the same language as that used in the first count.

The fifth to the eighth counts, inclusive, charged possession of liquor contrary to law. In the fifth count the charge was that the defendants—

* * * on to wit, the 19th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully have in their possession a large quantity of intoxicating liquor, to wit one-half pint of whisky, which said whisky then and there contained more than one-half of one per cent of alcohol by volume, and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. (R. 3.)

The sixth, seventh, and eighth counts followed the language of the fifth, except for the date upon which the whisky was alleged to have been possessed.

It is apparent that the first eight counts of the information were based upon the provision of Section 3, Title II, of the National Prohibition Act, that—

No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect,
 * * * sell * * * or possess any intoxicating liquor except as authorized in this Act, * * *.

The necessity for charging that the sales and possession alleged were not authorized by the Act was expressly obviated by the provisions of Section 32 of Title II, that—

* * * It shall not be necessary in any affidavit, information, or indictment * * * to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so.

In view of the definition of “intoxicating liquor” in Section 1, and of the above-quoted provisions of Section 32, there can be no doubt that each of the first eight counts of the information charged an offense under Section 3.

The last count charged nuisance and was that the defendants—

* * * on to wit, the 27th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully maintain a common nuisance in violation of the provisions of the National Prohibition Act, by then and there unlawfully selling, keeping and bartering intoxicating liquor in a certain building located at 328 East Broadway, in the

City of East St. Louis aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (R. 5.)

That count was based upon the following provisions of Section 21 of Title II:

Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor * * *.

Plaintiffs in error complain that the ninth count failed to allege that the intoxicating liquor therein referred to was fit for beverage purposes. But the language of that count, charging that the defendants "did then and there unlawfully maintain a common nuisance in violation of the provisions of the National Prohibition Act, by then and there unlawfully selling, keeping and bartering intoxicating liquor" on a date and upon premises specifically named, followed almost verbatim the language of Section 21, *supra*, and as, by reference to Section 1, the words "intoxicating liquor," as used in Section 21, necessarily meant a substance "fit for beverage purposes," the defendants were sufficiently apprised that the "intoxicating liquor" which they were charged with having sold, kept, and bartered was fit for beverage purposes.

Moreover, as each count of the information closely followed the language of the statute upon which it was based, it was incumbent upon the defendants, if they regarded any such count as lacking in sufficient particularity to apprise them of the charge they were therein called upon to meet, to request a bill of particulars, which they failed to do. In a similar instance this Court declared (*Ledbetter v. United States*, 170 U. S. 606, 612):

Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offence the offence may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offence. Where the statute completely covers the offence, the indictment need not be made more complete by specifying particulars elsewhere obtained. *Whiting v. State*, 14 Connecticut, 487; *Simmons v. State*, 12 Missouri, 268; *State v. Smant*, 4 Rich. (S. C.), 356; *Parkinson v. State*, 14 Maryland, 184.

III

THERE WAS SUFFICIENT EVIDENCE TO JUSTIFY THE TRIAL COURT IN SUBMITTING THE CASE AGAINST THE TWO ALBRECHTS TO THE JURY

Defendants in the court below interposed a motion, at the conclusion of the Government's evidence, to direct a verdict of not guilty (R. 41-42)

as to Henry Albrecht, Sr., and Henry Albrecht, Jr., which raises the question whether there was any evidence to support the verdict. The evidence disclosed circumstances indicating proprietorship of the premises in question on the part of the two Albrechts, supervision by them over the finances of the place, and observation of and control over the bartender, Maher.

Henry Albrecht, Sr., was in the cashier's cage part of the time and Albrecht, Jr., was there on other occasions and cashed checks, handled the money, and gave out trade checks to be used in the place. (R. 27, 29, 32.) Henry Albrecht, Sr., did not pay for drinks served to him and his friends. Both were seen behind the bar. (R. 33, 34, 35.) Albrecht, Jr., followed the bartender, Maher, into the rear room when Maher went there to get the liquor sold the agents. (R. 33, 34, 35.) He or both the Albrechts were in the place at every visit made by the agents. (R. 27, 29, 32, 33, 37.)

The District Court in charging the jury said (R. 43):

The question here is, of course, as to the guilt of each and all of these defendants. There is no direct evidence of a direct sale by either Henry Albrecht, Senior, or Henry Albrecht, Junior, as I recall the evidence; if I am in error you will remember the facts. The law upon that subject is this, gentleman; If under the facts and circumstances in evidence you believe that they were concerned in, that they were participating in, the sales

or in the possession of liquor at this particular place; if they had a business interest in it; if they had a common concern in it; if they were cooperating with defendant Maher; if the defendant Maher was their employee and sold such liquor and if they knowingly saw him sell such liquor in their place, or if it was their place and if they knowingly authorized him to sell and he did sell, or if they, acting in conjunction with him, participated in the sale of liquor or in the possession of liquor, then the guilt, if there is guilt, would be as much theirs as his, and the mere fact that one of several who are concerned in a joint enterprise makes a sale does not relieve the others if they are jointly interested with him. That is a question, of course, for you to determine from the evidence.

IV

DOUBLE PUNISHMENT WAS NOT IMPOSED

The final insistence of plaintiffs in error is that as the liquor which they were convicted of having sold was the same liquor which they were convicted of having possessed, and as they could not have sold such liquor without having possessed it, therefore their conviction of having sold necessarily included the offense of having possessed, and in imposing upon them separate penalties for the sale and possession of the District Court had subjected them to a double punishment for the same offense prohibited by the Fifth Amendment.

But possession and sale of intoxicating liquor under Section 3, Title II, of the National Prohibition Act do not constitute a single offense, but on the contrary two separate and distinct offenses, either of which may be committed without the commission of the other, and one of which may follow the other. Obviously, a person may possess intoxicating liquor without selling it; and he may possess it first and sell it later, as was done here. The fact that in a given case a person sold the same liquor which he possessed is not sufficient to render both the possession and sale a single offense.

While the particular point has not been before this Court for determination, similar contentions have been urged before it with reference to convictions under other statutes. Thus, in the case of *Burton v. United States*, 202 U. S. 344, where the statute involved declared that "No Senator * * * shall receive or agree to receive any compensation whatever" for services rendered or to be rendered by him in his official capacity, the plaintiff in error contended that under the evidence his conviction of *having received* necessarily included a conviction for *having agreed to receive*, and therefore that but one punishment could be imposed. This Court declared, however (p. 377):

It was certainly competent for Congress to make the agreement to receive, as well as the receiving of, the forbidden compensation separate, distinct offenses. The statute, in apt words, expresses that thought by say-

ing: "No Senator * * * shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered or to be rendered," etc. There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense. Or, compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated. * * * But Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense.

In *Gavieres v. United States*, 220 U. S. 338, the defendant was convicted and sentenced under an ordinance of the city of Manila which made it an offense for anyone to be drunk, or to behave in a drunken, boisterous, rude, or indecent manner in any public place. He was thereafter convicted and sentenced for violation of an article of the Philippine Code imposing a penalty upon anyone who should outrage or insult a public official. Both convictions were based upon the same acts. Asserting that the two offenses were actually but one and that by his conviction under the Code he had been placed

in double jeopardy contrary to the Organic Act of the Territory, Gavieres took the case to the Supreme Court of the Philippine Islands, which sustained the conviction. Upon a further review, this Court, affirming the latter judgment, said:

It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as was essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of opinion that while the transaction charged is the same in each case, the offenses are different.

And in *Morgan v. Devine*, 237 U. S. 632, where the defendant was convicted under one count of an indictment for violation of Section 192 of the Criminal Code (breaking into a post office with intent to commit a larceny therein), and under another count for violation of Section 190 of the same Code (knowingly stealing property of the Post Office Department), and was given a separate sentence of imprisonment upon each conviction, this Court sustained the judgment over the objection of the defendant that, as under the circumstances of that case the act charged in the first count was necessarily incident to the act charged in the second, he had committed but one offense and therefore could not be subjected to more than one penalty without violation of the Fifth Amendment.

CONCLUSION

The judgment of the District Court should therefore be affirmed.

Respectfully submitted.

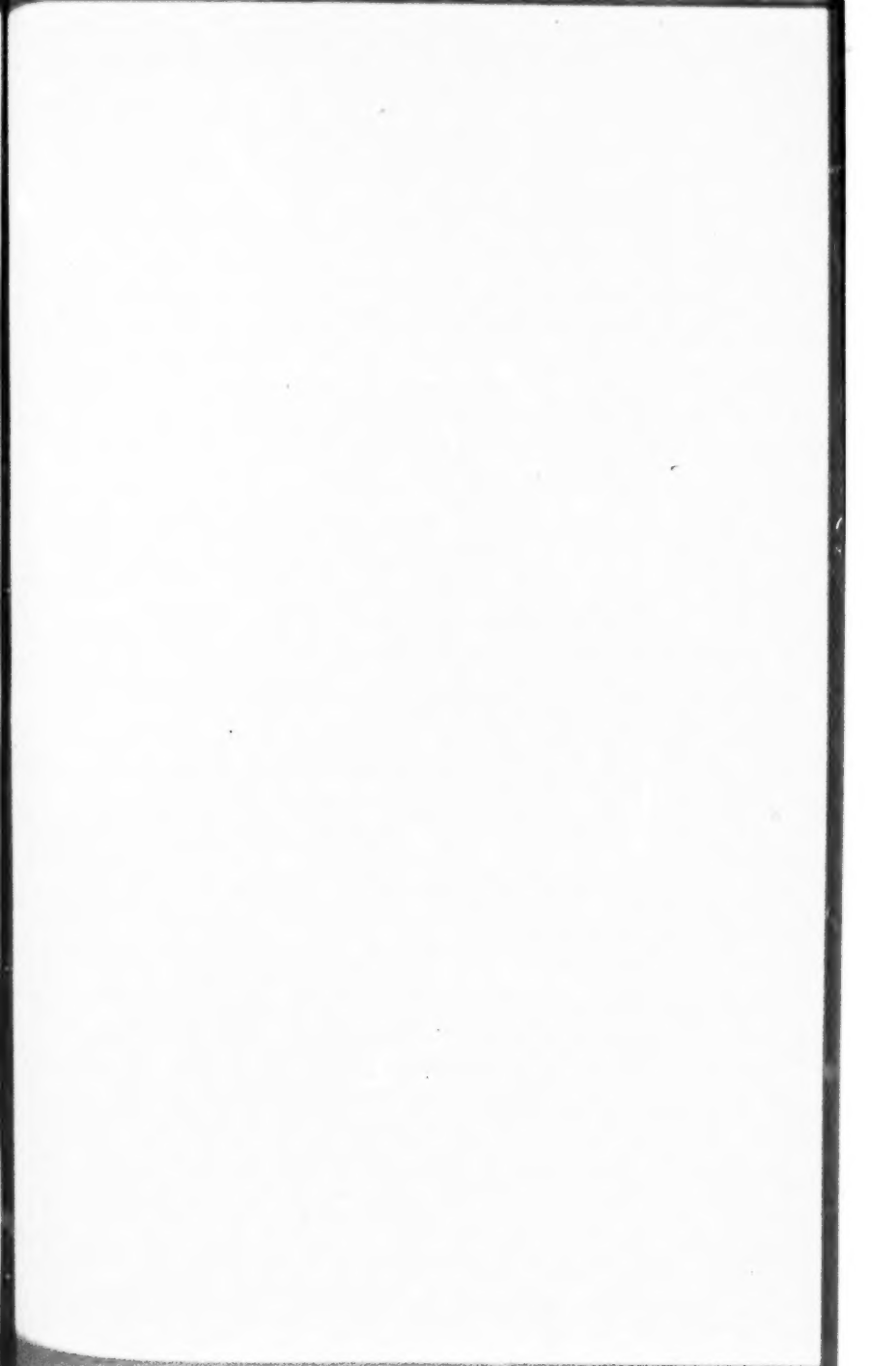
WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

JOHN J. BYRNE,
Senior Attorney.

NOVEMBER, 1926.

○



SUPREME COURT OF THE UNITED STATES.

No. 9.—OCTOBER TERM, 1926.

Henry Albrecht, Sr., et al., Plaintiffs	}	In Error to the District
in Error,		Court of the United
vs.		States for the Eastern
The United States of America.		District of Illinois.

[January 3, 1927.]

Mr. Justice BRANDEIS delivered the opinion of the Court.

This direct writ of error to the federal court for eastern Illinois, was allowed under § 238 of the Judicial Code prior to the amendment of February 13, 1925. Albrecht and his associates were sentenced to either fine or imprisonment upon each of nine counts of an information charging violations of the National Prohibition Act. There is no contention that the offences charged could not be prosecuted by information. See *Brede v. Powers*, 263 U. S. 4, 10; *Rossini v. United States*, 6 F. (2d) 350. The claims mainly urged are that, because of defects in the information and affidavits attached, there was no jurisdiction in the District Court and that rights guaranteed by the Fourth Amendment were violated. Several important questions of practice are presented which have not been passed upon by this Court, and on which there has been diversity of opinion in the lower courts, due in part to language in the opinions in *United States v. Morgan*, 222 U. S. 274, 282, and in *United States v. Thompson*, 251 U. S. 407, 413-414.

The information recites that it was filed by the United States Attorney with leave of the court; and the truth of this allegation has not been questioned. A bench warrant issued; and the marshal executed it by arresting the defendants. When they were brought into court, each gave bond to appear and answer; was released from custody immediately; and was not thereafter in custody by virtue of the warrant or otherwise. At the time of giving the bonds, no objection was made to either the jurisdiction or the service by execution of the warrant; and nothing was done then indicating an intention to enter a special appearance. On a later day, the defendants filed a motion to quash the information; declared

in the motion that they "specifically limit their appearance in the cause for the purpose of interposing" it; and protested that the court was without jurisdiction. The main ground urged in support of the objection was that the information had not been verified by the United States Attorney; that it recited he "gives the court to understand and be informed, on the affidavit of I. A. Miller and D. P. Coggins"; and that these affidavits, which were annexed to the information, had been sworn to before a notary public—a state official not authorized to administer oaths in federal criminal proceedings. Compare *United States v. Hall*, 131 U. S. 50. With leave of court, new oaths to the affidavits were immediately sworn to before the Deputy Clerk of the Court, and additional affidavits, also sworn to before him, were filed. Thereupon, a new motion to quash, setting forth the same grounds, was filed by the defendants; and this motion extended to both the information and the warrant. It also was denied; and a demurrer interposed upon the same ground was overruled. Then, upon a plea of not guilty, the defendants were tried, with the result stated; and a motion in arrest of judgment was denied.

As the affidavits on which the warrant issued had not been properly verified, the arrest was in violation of the clause in the Fourth Amendment which declares that "no warrants shall issue but upon probable cause, supported by oath or affirmation." See *Ex parte Burford*, 3 Cranch 448, 453; *United States v. Michalski*, 265 Fed. 839. But it does not follow that because the arrest was illegal, the information was or became void. The information was filed by leave of court. Despite some practice and statements to the contrary, it may be accepted as settled, that leave must be obtained; and that before granting leave, the court must, in some way, satisfy itself that there is probable cause for the prosecution.¹ This is done sometimes by a verification of the information, and fre-

¹The great majority of the lower courts dealing with the subject have insisted that the district attorney secure leave of court before filing informations, and have refused to grant leave except upon a showing of probable cause. *United States v. Shepard*, Fed. Cas. No. 16,273; *United States v. Maxwell*, Fed. Cas. No. 15,750; *United States v. Baugh*, 1 Fed. 784; *United States v. Reilly*, 20 Fed. 46; *United States v. Smith*, 40 Fed. 755; *United States v. Schurman*, 177 Fed. 581; *United States v. Quaritius*, 267 Fed. 227. In some districts the United States attorney has been permitted to file an information upon a purely formal allegation of leave, but the court determined the question of the existence of probable cause upon a motion of the defendant

quently by annexing affidavits thereto. But these are not the only means by which a court may become satisfied that probable cause for the prosecution exists.² The United States Attorney, like the Attorney General or Solicitor General of England, may file an information under his oath of office; and, if he does so, his official oath may be accepted as sufficient to give verity to the allegations of the information. See *Weeks v. United States*, 216 Fed. 292, 302.

It is contended that this information was not presented on the official oath of the United States Attorney; that instead of informing on his official oath, he gave "the court to understand and be informed on the affidavit[s]" referred to; and that, for this reason, the information is to be likened, not to those filed in England by the Attorney General or the Solicitor General, but to those exhibited there by Masters of the Crown upon information of a private informer; that the latter class of informations were required by Stat. 4 & 5, W. & M. C. 18, to be supported by affidavit of the person at whose instance they were preferred; that this requirement for informations of that character became a part of our common law; and, that, because the affidavits were not properly verified, the information could not confer jurisdiction.

The practice of prosecuting lesser federal crimes by information, instead of indictment, has been common since 1870.³ But, in fed-

to withdraw leave. *United States v. Simon*, 248 Fed. 980; *Yaffee v. United States*, 276 Fed. 497. The statements in *Ryan v. United States*, 5 F. (2d) 667, and *Miller v. United States*, 6 F. (2d) 463, that the United States attorney may file informations as of right, are based upon an incidental remark in *United States v. Thompson*, 251 U. S. 407, 413-414, which must be disregarded.

²A few cases have considered a verification essential to the validity of an information. *United States v. Tureaud*, 20 Fed. 621; *United States v. Strickland*, 25 Fed. 469. Compare *Johnston v. United States*, 87 Fed. 187; *United States v. Wells*, 225 Fed. 320. See *United States v. Morgan*, 222 U. S. 274, 282. The opposite conclusion was reached after great deliberation in *Weeks v. United States*, 216 Fed. 292, since followed by many cases. Reference may be made to *United States v. Adams Express Co.*, 239 Fed. 531; *Simpson v. United States*, 241 Fed. 841; *Abbott Bros. Co. v. United States*, 242 Fed. 751; *Kelly v. United States*, 250 Fed. 947; *Brown v. United States*, 257 Fed. 703; *United States v. Newton Tea & Spice Co.*, 275 Fed. 394; *United States v. McDonald*, 293 Fed. 433; *Vollmer v. United States*, 2 F. (2d) 551; *Wagner v. United States*, 3 F. (2d) 864; *Poleskey v. United States*, 4 F. (2d) 110; *Gray v. United States*, 14 F. (2d) 366.

³Two different courts, having before them criminal informations, were able to say, as late as 1870, that there had been no use of that procedure known

eral proceedings, no trace has been found of the differentiation in informations for such crimes, or of any class of informations instituted by a private informer comparable to those dealt with in England by Stat. 4 & 5, W. & M. C. 18.

The reference to the affidavits in this information is not to be read as indicating that it was presented otherwise than upon the oath of office of the United States Attorney.⁴ The affidavits were doubtless referred to in the information, not as furnishing probable cause for the prosecution, but because it was proposed to use the information and affidavits annexed as the basis for an application for a warrant of arrest. If before granting the warrant, the defendants had entered a voluntary appearance, the reference and the affidavits could have been treated as surplusage, and would not have vitiated the information.⁵ The fact that the information and affidavits were used as a basis for the application for a warrant did not affect the validity of the information as such.⁶ Whether the whole proceeding was later vitiated by the false arrest remains to be considered.

to them up to that time. *United States v. Shepard*, Fed. Cas. No. 16,273; *United States v. Cullas Joe*, Fed. Cas. No. 15,478. See also *Abbot's United States Practice*, Vol. II, 177. Story, writing in 1833, said that there was very little use of informations except in civil prosecutions for penalties and forfeitures. The Constitution, § 1780. In 1864, Congress passed a statute which provided for a summary criminal proceeding, begun by sworn complaint, in cases involving minor offenses by seamen. Act of June 11, 1864, c. 121, §§ 2, 3, 13 Stat. 124. In 1870 was passed a statute authorizing prosecution by indictment or information for crimes against the franchise. Act of May 31, 1870, c. 114, § 8, 16 Stat. 142. While there was probably a sporadic use of informations in criminal proceedings during the first eighty years of the government, as in *United States v. Mann*, Fed. Cas. No. 15,717 (1812), the use did not become general until after 1870. After 1870 prosecutions by information became frequent. See *United States v. Waller*, Fed. Cas. No. 16,634; *United States v. Maxwell*, Fed. Cas. No. 15,750; *United States v. Baugh*, 1 Fed. 784. See also, *Ex parte Wilson*, 114 U. S. 417, 425.

⁴Compare *Simpson v. United States*, 241 Fed. 841. *Contra*, *United States v. Schallinger Produce Co.*, 230 Fed. 290.

⁵Compare *Weeks v. United States*, 216 Fed. 292; *Poleskey v. United States*, 4 F. (2d) 110; *Miller v. United States*, 6 F. (2d) 463. See also *Kelly v. United States*, 250 Fed. 947; *Brown v. United States*, 257 Fed. 703; *Keilman v. United States*, 284 Fed. 845; *Carney v. United States*, 295 Fed. 606; *Wagner v. United States*, 3 F. (2d) 864.

⁶Compare *Yaffee v. United States*, 276 Fed. 497; *Farinelli v. United States*, 297 Fed. 198, 199. See *Jordan v. United States*, 299 Fed. 298.

The invalidity of the warrant is not comparable to the invalidity of an indictment. A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court. Compare *Ex parte Bain*, 121 U. S. 1. But a false arrest does not necessarily deprive the court of jurisdiction of the proceeding in which it was made. Where there was an appropriate accusation either by indictment or information, a court may acquire jurisdiction over the person of the defendant by his voluntary appearance.⁷ That a defendant may be brought before the court by a summons, without an arrest, is shown by the practice in prosecutions against corporations which are necessarily commenced by a summons.⁸ Here, the court had jurisdiction of the subject matter; and the persons named as defendants were within its territorial jurisdiction. The judgment assailed would clearly have been good, if the objection had not been taken until after the verdict.⁹ This shows that the irregularity in the warrant was of such a character that it could be waived. Was it waived? And, if not, was it cured?

The bail bonds bound the defendants to "be and appear" in court "from day to day" and "to answer and stand trial upon the information herein and to stand by and abide the orders and judgment of the Court in the premises." It is urged there was a waiver by giving the bail bonds without making any objection. We are of the opinion that the failure to take the objection at that time did not waive the invalidity of the warrant or operate as a general appearance.¹⁰ An objection to the illegality of the arrest

⁷See cases cited in note 5, *supra*.

⁸The leading case on the use of summons in criminal prosecutions against corporations in the federal courts is *United States v. Kelso*, 86 Fed. 304, followed in *United States v. Standard Oil Co.*, 154 Fed. 728; *United States v. Virginia-Carolina Chemical Co.*, 163 Fed. 66; *John Gund Brewing Co. v. United States*, 204 Fed. 17; *United States v. Philadelphia & R. Ry. Co.*, 237 Fed. 292; *United States v. Nat. Malleable & S. Castings Co.*, 6 F. (2d) 40.

⁹See *Dowdell v. United States*, 221 U. S. 325, 332; *Jordan v. United States*, 299 Fed. 298; *Yaffee v. United States*, 276 Fed. 497; *United States v. McDonald*, 293 Fed. 433, 437. Compare *In re Johnson*, 167 U. S. 120; *Simpson v. United States*, 241 Fed. 841; *Abbott Bros. Co. v. United States*, 242 Fed. 751.

¹⁰There has been no discussion, in the federal courts, of the possible effect of a bail bond as a waiver of the right to object to an illegal arrest. In *United States v. Shepard*, Fed. Cas. No. 16,273, and *United States v. Wells*, 225 Fed. 320, the court quashed informations because of the illegality of the arrest,

could have been taken thereafter by a motion to quash the warrants, though technically the defendants were then held under their bonds, the warrants having performed their functions. But the first motion to quash was not directed to the invalidity of the warrant. As that motion to quash was directed solely to the information, it could not raise the question of the validity of the warrant.¹¹ The motion to quash the warrant was not made until after the government had filed properly verified affidavits by leave of court. Thereby the situation had been changed. The affidavits then on file would have supported a new warrant, which, if issued, would plainly have validated the proceedings thenceforward. Compare *In re Johnson*, 167 U. S. 120. There was no occasion to apply for a new warrant, because the defendants were already in court.¹² The defect in the proceeding by which they had been brought into court had been cured. By failing to move to quash the warrant before the defect had been cured, the defendants lost their right to object. It is thus unnecessary to decide whether it would have been proper to allow the amendment, and deny the motion to quash, if the attack on the warrant had been made before the amendment of the affidavits.¹³

though the defendants had given bond without objecting to the illegality, but the question of waiver was apparently not pressed upon the courts. The trend of authority in the state courts does not consider that giving bond is a waiver, since the defendant must give bond or go to jail, and will ordinarily have little knowledge of his legal rights. *People v. Gardner*, 71 Misc. 335, 130 N. Y. Supp. 202; *State v. Simmons*, 39 Kan. 262 (but compare *State v. Munson*, 111 Kan. 318). Compare *Solomon v. People*, 15 Ill. 291; *State v. Huford*, 28 Ia. 391. See *Eddings v. Boner*, 1 Ind. Terr. 173, 179-180. Contra, *State v. Wenzel*, 77 Ind. 428. It is of course possible that giving bail plus very little else may amount to a waiver. *Ard v. State*, 114 Ind. 542; *State v. McClain*, 13 N. Dak. 368.

¹¹There has been confusion as to the proper method of taking an objection to an illegal arrest. Some cases in the lower federal courts have apparently allowed it to be taken by a motion to quash the information or indictment. *United States v. Illig*, 288 Fed. 939. Compare *United States v. Tureaud*, 20 Fed. 621; *Johnston v. United States*, 87 Fed. 187; *United States v. Wells*, 225 Fed. 320. Later decisions require that the objection be taken to the warrant, not to the information or indictment. *Farinelli v. United States*, 297 Fed. 198, 199; *Schmidt v. United States*, 2 F. (2d) 367. Compare *Christian v. United States*, 8 F. (2d) 732, 733.

¹²Compare *Smith v. State*, 20 Ala. App. 442; *State v. Volk*, 144 Minn. 223.

¹³See the action of the lower court described in *Poleskey v. United States*, 4 F. (2d) 110. As to allowing, after objection taken, the amendment of the

There is a claim of violation of the Fifth Amendment by the imposition of double punishment. This contention rests upon the following facts. Of the nine counts in the information four charged illegal possession of liquor, four illegal sale and one maintaining a common nuisance. The contention is that there was double punishment because the liquor which the defendants were convicted for having sold is the same that they were convicted for having possessed. But possessing and selling are distinct offenses. One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offence. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction. The precise question does not appear to have been discussed in either this or a lower federal court in connection with the National Prohibition Act; but the general principle is well established. Compare *Burton v. United States*, 202 U. S. 344, 377; *Gavieres v. United States*, 220 U. S. 338; *Morgan v. Devine*, 237 U. S. 632.

The remaining objections are unsubstantial and do not require discussion.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

process by which the defendant has been brought into court, see *People v. Hildebrand*, 71 Mich. 313; *Town of Ridgeland v. Gens*, 83 S. C. 562; *Keehn v. State*, 72 Wis. 496 (but see *Scheer v. Keown*, 29 Wis. 586). Compare *State v. McCray*, 74 Mo. 303. In *State v. Turner*, 170 N. C. 701, 702, the court said: "Even if one is wrongfully arrested on process that is defective, being in court, he would not be discharged, but the process would be amended then and there, or if the service were defective it could be served again."